IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 95

A. G. RISTY, ET AL, as County Commissioners, etc., et al,

Appellants,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Appellée,

And the Four other cases set forth on the Cover page hereof, numbered 96, 97, 98 and 100, inclusive.

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

PETITION FOR REHEARING.

All references to record pages hereinafter made will be made to the printed record in case No. 96, Chicago, Milwaukee & St. Paul Railway Company, Appellee. All the other cases have the identical records hereinafter referred to, but the pagings, of course, will be different. For that reason we limit ourselves to the record in case No. 96.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Having carefully examined the opinion of the Honorable Court herein, we think with propriety we may ask

the Court to consider whether the opinion does not err on certain vital points. We respectfully submit that there is such error, and therefore, appellants pray this Honorable Court to set aside the opinion and judgments rendered herein on March 1, 1926, and to reverse the decision of the District Court in these cases. Supporting this appellants respectfully say that the Court overlooked the following matters:

FIRST.

The pronouncement that "while *Gilseth v. Risty*, 46 S. D. 374, has expressions which, standing by themselves, might be regarded as supporting that the proceedings at bar were authorized by statute — the court clearly rested its decision upon other grounds, and the said decision does not so clearly or decisively pass on the question involved herein as to control the decision here," clearly overlooks the true holding in that case.

SECOND.

The basic "fact" found by the trial and appellate Court, and which this Court assumes to be true in its decision, is the finding that "Drainage Ditch No. 1 and 2 was not a new project (and) that no new or additional drainage was established". It is our contention that this "Finding of Fact" is not only unsupported by any evidence in the record, but the undisputed evidence is against such finding, and the same is conceded by appellees Milwaukee, No. 96, and Omaha, No. 97.

THIRD.

The meaning and interpretation of Sections 8458 and 8476 of the Revised Code of South Dakota, 1919, as construed by this Court, is not in accord with the repeated construction placed thereon by the Highest Court in the State of South Dakota.

ARGUMENT.

I.

THE GILSETH DECISION SHOULD CONTROL AS TO EVERY PRONOUNCEMENT THAT WE HEREIN CHALLENGE.

This Court speaking with reference to amount in controversy says that "the substantial basis of the suit was want of jurisdiction in the Board". Surely the Gilseth decision speaks clearly and decisively as to that vital matter. This will be obvious from the following statement of just what that decision is. The very last thing in it is the finding that Gilseth was estopped. What is said on this head is purely an independent ground for affirmance stated after several other such independent grounds had been put forth. It does the utmost violence to that decision to hold that it "rests" on that last stated ground. If there be any stressing it is as to the grounds that come first. If there be any difference in emphasis the last ground is the more incidental. Indeed the very fact that there was an affirmance in the Gilseth case makes it error to hold that the estoppel is the essence, because the affirmance of necessity declares that the Board had jurisdiction to do just what it did do.

The Gilseth decision:

It deals with reference to the very project at bar; and says the record shows that in 1908, a petition was filed with the County Commissioners asking that the said drainage district be extended several miles farther up the river, and that the following further action was had upon this pettiion, to-wit:

> "Said petition was allowed, and a resolution adopted by the Board of County Commissioners, establishing said drainage and designating it as 'Drain Ditch No. 2', extending said original drain No. 1 from the upper end of said original drainage ditch No. 1 about 12 miles".

This would seem to be a clear cut holding that the project asked for and ordered was *not* a repair project, and that, instead, there was an extension about 12 miles long "extending said original drain Ditch No. 1 from the upper end of said original Drainage Ditch No. 1".

(If we accept this Court's pronouncements the establishment of Drainage Ditch No. 2 was only repair and maintenance of the original Ditch No. 1, and could only be paid for by assessment upon Ditch No. 1 district).

Surely, in cases of mere maintenance of an existing ditch there could be no such thing as "an original drainage ditch", as distinguished from an extension of an original drain. In maintaining an established project there is but one ditch; there is neither original nor extension of original.

> "Sometime in April, 1916, Gilseth and others affected by the condition of the water and of the existing drainage ditches, filed a petition with the Board "asking that said spillway be abandoned and that the water flowing through said ditches be turned through a certain sleugh or lake in the northern part of te city of Sioux Falls and thence into the channel of the river and flow around said city. A survey of said proposed plan was made, and, after notice to the interested parties a hearing was had upon said petition and report of said survey. On the 8th of July following, an order was made granting said petition. Thereafter, many conferences were had between plaintiff and the said petitioners and other interested parties, with the result that the said petition and the said plan of drainage were abandoned. Thereupon, a second petition was filed, asking for the re-establishment of drainage ditch No. 1 and 2, for the re-construction of said spillway and for the enlargement of the drainage area so as to include all the land along the river to the outlet of said spillway. This petition was filed on the 3rd of August, 1916. The Board thereupon caused

a survey to be made of the entire area covered by the said last named petition. Upon the filing of the report of such survey the Board gave notice of hearing on the said petition and upon such hearing the Board, on the third day of October, 1916, made an order purporting to establish a new drainage district, designating it as 'drainage ditch No. 1 and 2', and this drainage district included the entire area of the two former districts together with drainage area along the river through the city of Sioux Falls."

Speaking to whether the project is a new enlarged district, the Supreme Court of South Dakota said:

"The Board then proceeded to do the work necesary to carry out the plan contemplated by the said order. The ditches in what had been drainage districts Nos. 1 and 2 were cleaned out, widened, deepened, and diked, *so as to greatly increase the carrying capacity thereof. Several cut-offs were made in the river so as to accelerate and increase the flow of water* through the channel of the river, a new and larger spillway was constructed".

The doing of all this work cost approximately $240,000.00.

"It is contended by the appellant that the project contemplated by the petition was not the creation *of a new drainage district or a new drainage ditch* but merely to repair a project already in operation, and that, therefore, the Board was without authority to proceed. *But this contention is not tenable."*

"But the two projects were by no means identical. The drainage district involved in this case contains a materially larger area than the combined areas of the two old ditches".

"The Constitution, Section 6, Article 21, and the Statute, Section 8458, gives the Board the same au-

thority to repair an old ditch that it does to construct a new one."

"The filing of the petition, asking for the establishment of a new drainage ditch on the third of August, 1916, gave the Board jurisdiction to proceed with the inspection and survey of the proposed drainage area as required by the provisions of Sections 8460 and 8461, Revised Code, 1919, citing *Laning v. Palmer,* 117 Mich. 529, 76 N. W. 2".

"Upon the filing of the surveyor's report the board was authorized to fix a time and place for the hearing on said petition. This was done and the notice provided for in Section 8461 given. The hearing was had as provided for in Section 8462".

"The board after a full hearing found the drainage, as petitioned for in said petition, to be conducive to the public health, convenience and welfare, and necessary and practicable for the drainage of agricultural lands".

"Numerous irregularities on the part of the Board are alleged and it may be assumed that the Board did in certain instances proceed in an irregular manner. But it is not shown that the Board did in any instance exceed the jurisdiction conferred upon it by law".

"All the irregularities complained of occurred after the Board had acquired jurisdiction of the subject-matter".

"No appeal was taken from the order establishing the new district. Therefore, *the order became final, and there cannot in our judgment be any* question of the board's jurisdiction to proceed to carry out the work contemplated by the petition".

"No fraud or bad faith on the part of the board has been shown.

It was after all this was said that the Court then

spoke of estoppel (upon which it is claimed the decision "rests") then:

> "While plaintiff did not sign this petition he was present at the hearing thereon and is presumed to have known that whatever was done in the way of constructing any drain, ditches or repairing the old ones would have to be paid by an assessment on the property that received the benefits. He saw the work in progress and was advised of all that was done".
>
> "Two years were allowed to elapse after the work was completed before this action was commenced".
>
> "Appellant having stood by and seen all the work performed without protest, and having received all the benefits that can result therefrom, should not now be permitted to escape payment for the same. The relief asked by appellant is equitable in its nature, but because of the circumstances above shown, all the equities of the case are against appellant and in favor of the Board".

It is said also in the Gilseth case:

> "At the hearing Gilseth and many others interested were present".
>
> "Appellant was present when the order granting the new district was made. If he believed that such order was prejudicial to his rights, or was dissatisfied for any reason with the course pursued by the Board, he should have appealed from the said order before the expense of executing the same had been incurred".

There is just one way to argue that nothing but the estoppel pronouncement is a binding decision — and that is to claim that if a decision is made on more than

one ground, then nothing is decided. That is not the law.

In *First National Bank v. Board,* 264 U. S., 455, it was contended that the decision turned upon the point that plaintiff had an adequate remedy at law, and not upon the question whether plaintiff had lost its rights by neglecting to seek administrative remedy. The Court said:

> "It is true the court, after the statement quoted above, proceeds to say that plaintiff cannot have relief in equity. But this seems to be put forth as an independent ground for affirming the judgment. It follows the unqualified statement that 'plaintiff having refrained from seeking the administrative relief open to it, may not now complain'."

It is next said that though adequacy of remedy was also dealt with, there is a holding that administrative remedies must be exhausted prior to judicial challenge, and that, indeed, such pre-requisite could not be dispensed with.

> "The case is of *equal* authority upon each of two distinct and sufficient grounds upon which an appellate court rests its affirmance of a judgment, although only one of those grounds was considered in the court below."
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> *Union Pacific v. Ry.,* 199 U. S., 160.
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> "Where a decision is based on two independent lines of reasoning, neither is a dictum".
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> *Pugh v. Moxley,* 104 Cal., 374.
>
> "Where an appellate court bases its decision on two or more distinct grounds, each is as much an authoritative determination as the other, and neither can be disregarded as dictum."
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> *King v. Pauly,* 159 Cal., 549.
>
> "Where a case presents two or more points any one of which is sufficient to determine the court

issues, but the court actually decides on such points, the case is an authoritative precedent as to every point decided, and none of such points can be regarded as having merely the status of dictum."

15 C. J., 953.

This is supported by citations from this court, Federal Courts, California, Iowa, New York, Oregon, Tennessee, Texas, Washington, and Wisconsin.

"An adjudication on any point within the issue presented by the case cannot be considered a dictum. Accordingly, a point expressly decided does not lose its value as precedent because the disposition of the case is based upon other grounds."

15 C. J., 952.

The text cites for support cases in this Court, the Federal Courts, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Tennessee, Washington, and from English Courts.

"This is so even though by reason of other points in the case, the result reached might have been the same if the court had held on the particular point otherwise than it did."

15 C. J., 952.

Where one specific objection urging invalidity of a statute is raised by the record, and argued by counsel, the denying the force of the objection is not dictum, even though the statute is held invalid on other grounds.

Carstairs v. Cochran, 95 Ind., 488, affirmed 193 U. S., 10.

"It cannot be said that a case is not authority on one point, because although that point was properly presented and decided in the regular course of consideration of the cause, something else was found in the end which disposed of the holding made."

Railway Co. vs. Schutte, 103 U. S., 119.

It is said in *Ontario vs. Wilfong,* 233 U. S., 543:

> "Though both were grounds of decision, to-wit: that the decision was not based alone on actual knowledge of what property was intended to be taxed, but upon the sufficiency of a description to identify the land in connection with the notice given to appellant — this does not constitute dictum."

If this were not true, every decision having more than one point would be dictum in toto. Every litigant could pick out one of the points and say it was dictum because other points were decided. His opponent might select other points that were decided as being alone the essence of the decision. In effect, it would lead to holding that nothing is a decision unless the court limits itself to passing upon some one single point.

II.

FACT ASSUMED NOT SUPPORTED BY ANY EVIDENCE.

When we say this Court overlooked a fact question, we are not unmindful of the rule that this Court is not a trier of facts, (Case *Mfg. Co. vs. Soxman,* 138 U. S., 431), nor of the well settled rule mentioned in the case of *U. S. vs. State Investment Co.,* 234 U. S., 206, 207, that the concurrent findings of the two lower courts will be accepted by this Court unless error is shown, and neither are we unmindful of the rule of the cases on the law side of the Court, that errors merely in the findings of fact by the Court are not subject to revision by this Court if there is any evidence upon which its findings could be made. *Alexander vs. Machan,* 147 U. S., 72, 77; *Dooley vs. Pease,* 180 U. S., 126, 131, 132. The rule of concurrence with the conclusions of the trial and appellate courts is given more weight when in the first instance the facts are found by a master or a jury. *Furrer vs. Ferris,* 145 U. S., 132, and cases cited in the opinion; *Beyer vs. Le Fevre,* 186 U. S., 114, 119. However, all of these rules are subject to the additional rule, that the

findings made by the two lower courts must be based upon *some* competent evidence in the record, or it will be disregarded. *Beyer vs. Le Fevre*, 186 U. S., 114, 119; *Darlington vs. Turner*, 202 U. S., 195, 220.

We respectfully assert that the finding of the two lower courts which is approved by this court and hereinafter mentioned, is without *any* support, and is not based upon *any* competent evidence in the record.

This Court in its opinion says:

> "The two Courts below agree as to all material facts. We accordingly consider them here only so far as is needful to pass on questions of law. * * * *
>
> "Both courts below found that the drainage ditch No. 1 and 2 was not a new project, but was in fact identical with the previously established ditches No. 1 and No. 2; that no new or additional drainage was established, and that the only purpose of the proceedings was to provide for the maintenance and repair of the previously established ditches by assessing the cost on tracts not included within the area originally assessed for their construction. For these reasons, among others, both courts held that the proceedings had by the Board of County Commissioners to apportion and assess benefits on land outside the original drainage districts were unauthorized and void under the statutes of South Dakota. In this we think they were right."

The foregoing statements are apparently based upon the theory that there was *some* evidence to support the findings of the lower courts, but in making these statements, we believe this Court inadvertently overlooked the fact that there is *no* evidence in the record to support such findings by either of the lower courts, and this point appellants attempted to stress in their argument.

The findings of the trial court appear on pages 84

to 87 of the record. Assuming for the moment that Section 8458 of the Revised Code authorizes the Board to do *three* things, viz: "(1) May establish and cause to be constructed any ditch or drain; (2) may provide for the straightening or enlargement of any watercourse or drain previously constructed, and (3) may provide for the maintenance of such ditch, drain or watercourse"; we find that whenever there is presented a question of deepening or widening a drain, or of straightening, cleaning out, or deepening creek channels and streams, or remodeling or repairing dikes or barriers, all proceedings therefor are to be considered upon like notice, hearing, etc., as though the project were a new project. (Sec. 8476), which means, of course, upon petition, notice, hearings, surveys, orders, apportionments, equalizations, assessments, etc., as provided by Sections 8458 to 8569, inclusive. The trial judge and the highest court of the State hold that the notice at bar was valid and sufficient. We also find that when it is desired to merely repair or maintain a ditch previously constructed, the work may be done only "upon the petition of any person setting forth the necessity thereof, and after due inspection by the Board of County Commissioners", but without notice or public hearing thereon. (Section 8470). Whether, therefore, the project be one for *enlargement,* or one for *maintenance,* the law requires that a proper petition must be first filed with the Board before the Board can consider the work. It is clear, from this law, that the determination of what should be done concerning a ditch previously constructed, does not lie in the first instance with the Board to determine, but such determination is made by those whose land is affected by such established drainage. They petition the Board, and say that they desire the constructed ditch to be *enlarged* so as to make a more complete drainage project, or that the ditch so previously constructed shall be *merely repaired* and kept in the same condition as originally constructed. A petition having been presented, the Board is then authorized to consider the same in connection with the physical condition of the drainage suggested, and the Board may

either reject or grant the petition, and that only. (Sorenson case, infra). In the case at bar, as we will later show, the petition called for an *enlargement* of a previously existing drainage ditch, (Record, p. 50), and the Board, therefore, was only authorized to consider that petition together with the facts as found generally by the trial court, as indicated supra, and the Board, acting thereon, after due hearing, granted the prayer of the petition and established the enlargement project. The determination of the Board thereon is quasi-judicial, and had it refused to grant the prayer of the petition in part or in toto, the petitioners would have had the right to appeal to the Circuit Court and the Supreme Court of the State of South Dakota for redress. Such is the ruling of the highest court of the State.

In the case of *In re Sorenson Drainage Ditch,* 27 S. D., 342, the ditch there considered was established in 1907 and was thereafter constructed and completed. Later, owners of lands affected petitioned the Board, and alleged that the ditch was "wholly insufficient and inadequate to drain a portion of the lands through which the same runs, and which were assessed", and was "wholly insufficient in size to carry off the water so collected", and that the same would "flood the lands and destroy the crops and vegetation", unless the same was "deepened, widened and enlarged", and prayed that it be "enlarged, deepened and widened", and that "bends in said ditch be straightened out, and that the same would be more efficient if straightened". On June 8, 1910, upon due notice, the Board made an order enlarging the ditch, but to a very much less extent than petitioned for. The petitioners appealed to the Circuit Court, and alleged that "the proposed enlargement granted by the Board was entirely inadequate and insufficient". The Board moved to dismiss the appeal, and the Circuit Court dismissed the appeal. The petitioners then appealed to the Supreme Court. The respondent Board contended that inasmuch as it had determined to enlarge the ditch to a certain extent, but not to the extent asked for, and as

the petition was one for enlargement of an already established ditch, the order of the Circuit Court was not, therefore, an appealable order, for the reason that it did not present a judicial question, and was not such a one as could be appealed under the drainage law, in that it was not an appeal from any final order or determination of the Board establishing or denying the proposed drainage. The Board urged that appellants' only remedy was to have appealed from the original establishment, and having failed so to do, they could not, by a petition to enlarge, indirectly accomplish an appeal, and could not attack the original decision fixing the size and route of the ditch. In other words, respondents contended that they alone had the authority to decide how much enlargement should be made, or whether it should be an enlargement or a maintenance project.

The Supreme Court, construing the drainage law, held that the action of the Board was quasi-judicial, and that the action of the Board upon the petition was a final and appealable order; thus conclusively determining that the Board must be governed by the petition presented, and that it did not lie within its power to determine in the first instance whether the constructed ditch, under the circumstances existing, should be enlarged, or should be repaired and maintained in its original condition, but that the authority to make such determination resided solely in the owners of property affected by the original ditch. The Court said: "The petition of the appellant and associates, while not demanding the construction of an entirely new ditch, does demand the enlargement of a ditch already constructed, to such an extent as, in effect, to constitute a drainage ditch, and a denial by the Board of the application, except to a very limited extent, was in effect a denial of the proposed drainage." * * * * * It seems quite clear that an order establishing or denying a proposed drainage by way of enlarging a ditch previously constructed, is equally as final and quasi-judicial in its character as an order establishing or denying the construction of the originally proposed drainage ditch."

In the case at bar, the petition (Record, p. 50), says that the petitioners are affected by the ditch, and that the old ditches have been established and constructed, and "that said drainage ditches Nos. 1 and 2, *were and are insufficient* to accomplish the purpose for which they were constructed, and were and are insufficient to properly drain the agricultural lands within the drainage districts or territory supposed to be drained thereby, and are insufficient for the drainage of *other agricultural lands* lying within the valley of the Big Sioux River above the mouth or outlet to said drainage ditches Nos. 1 and 2, and *between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said ditches, Nos. 1 and2 was imposed*", and "that it is necessary for the drainage of agricultural lands within said drainage districts Nos. 1 and 2, *and also* agricultural lands lying above the mouth of the spillway or outlet to said ditches and *between the mouth thereof and the present boundaries of said drainage districts,* to reconstruct, deepen, widen and improve said drainage ditches", and "that in the reconstruction of said ditches, that it will be necessary that the same be *cleaned, deepened, widened* and that certain *levees, dikes* and *flood gates* and *barriers* thereto be constructed to such extent as may be necessary *to carry off the surplus or flood waters* and to properly drain and protect the lands within said drainage districts and within the areas hereinbefore described", and "that the lands and territory likely to be affected * * * * are all the lands lying in the valley of the Big Sioux River and included within the present boundaries of said drainage districts, *as well as* all of the lands in the valley of the Big Sioux River between the mouth of said spillway and the city of Dell Rapids, South Dakota, that are subject to overflow if said outlet to said drainage ditches be abandoned and said outlet closed and that said district should be so *extended* and *enlarged* as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway". An examina-

tion and comparison of the petition at bar with the petition in the Sorenson case (Supra) will disclose that this petition was evidently drawn and patterned upon the petition in the Sorenson case. What the petition prayed be done by the Board, what was done by the Board, and the cost thereof is shown by the record in this case, namely, that the original ditches were forty (40) feet wide and cost approximately $127,706.21, (Record pp. 119, 155, 203), while the new enlarged drainage ditch was ninety (90) feet wide and diked, and the river canalized, at a cost of over $250,000.00, (Record p. 304), providing a ditch of over twice the capacity, at a cost of over twice the amount of the cost of the original ditches. The enlarged ditch is longer than the combined old ditches. The enlarged ditch and spillway cares for approximately 3,000 cubic feet of water per second or one-third of the maximum flood stage run-off of this drainage basin, while the old ditches cared for but 1400 second feet of water. The board by resolution abandoned the outlet to the old ditch thereby throwing the flood water into Covell Lake and thence following the river around the City of Sioux Falls. The enlarged ditch keeps this flood water from passing around the City of Sioux Falls. All of which shows that there was, in fact, an additional drainage established and given to the properties below the old drainage district, included in which are the properties of the appellees for keeping flood waters off of land and property is equivalent to draining the water off after it is once on. This large expenditure and this additional drainage was clearly not intended by the petitioners, nor by the Board, as repair or maintenance, and should not be held by the Board or by any court to be maintenance and repair, which can mean only replacing and keeping in its original condition.

In the Sorenson case (Supra), the petitioners asked for an enlarged drainage. The Board granted the petition only in part, and denied it in part, and the Supreme Court of South Dakota held that this was a final and an appealable order, and, in substance, that the Board

had no authority to modify the petition, or to determine whether the ditch should be only repaired and not enlarged. But on the other hand the Board was entirely governed by the petition filed, and could either grant or reject the same. In the present case, the petitioners requested an enlarged drainage project, and upon notice duly given, the Board granted the prayer of the petition and an enlarged drainage was established, (Record p. 58), and later constructed at an expense of over twice the expense of the original ditches. This is the evidence and the only evidence under the law applicable thereto, as interpreted by the Supreme Court of South Dakota, and which evidence was entirely overlooked by the trial court in its findings in the case at bar, and which was again overlooked by the Circuit Court of Appeals. What the Board of County Commissioners may think should be done with an inefficient ditch previously constructed, or what a court might think should be done under the circumstances as to whether that ditch should be repaired or enlarged, is absolutely immaterial, for their action is, and should be, entirely governed by the petition filed, as truly as a court's decision is governed by the issues made by and confined to pleadings in an action in court. It is the pleader's choice to place his issues where he desires, and so it is the petitioners' choice in drainage matters to ask for exactly what they desire, and it does not lie within the province of the Board of County Commissioners or of a court to tell the petitioners that what confronts them is not an enlarged drainage ditch, but the maintenance of a ditch already constructed. The only competent evidence in this case of what confronted the Board of County Commissioners at the time the present project was instituted, or at the time these cases were tried in the United States District Court, was the petition, Exhibit "A", in this record, (Record, p. 50), and there was absolutely no evidence before the trial court, and there is no evidence in the record, in the absence of a pleading and proof of fraud, which substantiates the trial court's finding that the present proceedings were a maintenance project, and not

an enlarged project. It is, therefore, clear that the trial court's finding that "The thing that confronted the Board of County Commissioners at that time, having charge of these two drainage districts, was the *maintenance* of the ditches. * * * The situation that confronted them was not drainage of agricultural land, it was maintenance of the ditches that had been established by them, and the prevention of dangers threatened", (Record p. 86), is absolutely unwarranted under the evidence and the law applicable thereto. It is not within the authority of the court to determine what should have been done, and then to say that what was done was in effect what the court thinks should have been done, namely, repair and maintenance work.

The highest court of South Dakota, in interpreting the drainage law in the Soreson case, (supra), held that the determination of the Board of County Commissioners upon the petition filed for enlargement of that ditch, was a quasi-judicial act, and if that be true, then that determination cannot be changed or altered by another court, in the absence of a plea and proof of fraud, except upon appeal, as provided by the drainage law of the State, and no appeal was taken from the determination in establishing Drainage Ditch No. 1 and 2.

The case of *Curtiss vs. Pound*, 34 S. D., 628, 633, was a mandamus proceeding brought against Pound and others, as supervisors of a township, to require them to levy a tax to pay a drainage ditch assessment. When the commissioners decided to construct the ditch described in the petition and notice, certain interested parties appealed from the order of the commissioners, and the Circuit Court entered a judgment directing the construction of a ditch in accordance with the original petition, but thereafter the commissioners constructed a ditch twice the length of the one petitioned for, and the township then set up this fact as a defense in the mandamus proceedings, and the Court said: "If the commissioners exceeded their jurisdiction in the length of the ditch, and size of tiling, its only effect, so far as

appellants were concerned, was to increase the amount assessed against them, above the amount that should have been assessed. This is a matter which should have been settled at the time of assessment of benefits, and appellant's remedy for an unjust or unwarranted assessment was through an appeal to the Circuit Court from such assessment"; thereby holding that the order of the Board was a final judicial order, and could not be attacked collaterally, in the absence of a pleading and proof of fraud.

In the case of *Milne vs. McKinnon*, 32 S. D., 627, 631, which was an action in equity to restrain the sale of real property in satisfaction of a special assessment made under the drainage law, and in which it was claimed that the Board acted without jurisdiction, and that the land assessed was not benefitted, the Court said: "Whether (the land) would receive any benefits from the drainage system, and the extent of such benefits, was a matter clearly within the jurisdiction of the Board to determine, and its determination thereon *honestly made*, can only be reviewed upon an appeal", and "error, if any, in the method of assessment by which a wrong result may have been reached, would be a matter to be considered by the reviewing court upon an appeal from the determination of the Board."

In the case of *Gilseth vs. Risty*, 47 S. D., 374, 379, the Court said: "The Board, after a full hearing, found the drainage as petitioned for in said petition, to be conducive to the public health, convenience and welfare, and necessary and practical for the drainage of agricultural land. No appeal was taken from the order establishing the *new district*. Therefore, the order became final." True there was an estoppel found, but it in no way detracts from the above ruling. (See also *Sanborn County vs. Estabrook*, (S. D.) 207 N. W. 164, 165.

In all of the foregoing cases the Supreme Court of South Dakota has consistently held in their interpretation of this drainage law, that the determinations of

the Board of County Commissioners acting as a drainage Board, are *quasi-judicial determinations,* and that such judgments cannot be attacked collaterally, in the absence of fraud. Can the Federal Courts do otherwise than follow the interpretations given to the drainage statutes by the highest Court of South Dakota?

These are collateral actions, and no fraud has been pleaded, and there is no evidence of any fraud whatsoever in the record. The judgment of the Board establishing this new *enlarged* drainage, cannot be set aside by a State Court in a collateral action, and that judgment is just as binding on the Federal Courts, and upon a non-resident in Federal Court as upon the State Court or a resident in State Court, when there is neither plea nor proof of extrinsic fraud.

In *Steenburg vs. Kyle,* (Ind.) 121 N. E., 537, under a state of facts similar to the facts found here by the trial Court, it was contended that the new ditch established along the line of an old ditch in no way affected the jurisdiction of the old ditch proceeding. The Court said: "It seems to us that the fair interpretation of the facts leads to the conclusion that the (old) ditch was superceded by the (new) ditch. * * * However that may be, it should have been presented to the * court. It had jurisdiction to determine the character of the proposed (new) drain, and we must presume that it did so and rendered judgment which is conceded to be fair upon its face. That judgment is entitled to full faith and credit by courts of coordinate jurisdiction, as well as by this Court, until set aside, either on appeal or by a direct proceeding brought in the Court rendering it for that purpose."

Applying this holding to the case at bar, where no appeal was taken from the Resolution establishing the new enlarged drainage, such establishment is now conclusive as against these collateral attacks.

CONCESSIONS IN TWO CASES.

This Court, in its opinion, entirely overlooked the concession made by the Appellees Milwaukee, No. 96, and the Omaha, No. 97, in both their briefs and arguments, in this Court and in the Circuit Court of Appeals, that the appellants' contention that the work done was not repair or maintenance work, but that the proceeding known as Drainage Ditch No. 1 and 2, was a new drainage project. Counsel in his Brief (M., p. 13), uses this language:

> "We accept the position of counsel for the appellants that Drainage Ditch No. 1 and 2 was an original and independent ditch proposition".

With this concession made, it can hardly be said, as to these two cases at least, that the trial Court's finding that "Drainage Ditch No. 1 and 2 was not a new project, and that no new or additional drainage was established", can be sustained. With the concession made that the trial Court's finding of fact is not an issue in said cases, and that the same is not true, then that question, the appellees concession, was not before the Court, and the Court could not pass on a non-issuable fact, and find it different than the parties concede the fact to be.

III.

CONSTRUCTION OF ASSESSMENT STATUTES.

Our third proposition is the proper construction of, and the construction given by the Supreme Court of South Dakota to Section 8458 and Section 8476, Revised Code.

This Court in its opinion recognizes the fact that Section 8458 authorizes the Board of County Commissioners as a drainage Board to do equally, three distinct things, viz: (1) May establish a new ditch, (2) may straighten or enlarge a watercourse or ditch previously constructed, and (3) may provide for the maintenance of such ditch, drain or watercourse previously constructed.

But this Court overlooked the connection between

Section 8458 and Section 8476 by misconstruing, as we believe, and giving an improper interpretation to, Section 8467 covering "assessments for further costs"; by construing that section to apply to assessments for costs of maintenance of an old ditch and overlooking the connection, between that part of Section 8464 providing for assessments for paying *damages* and the provision of Section 8465 as to the payment of such damages before any physical construction of the ditch is undertaken and Section 8467 which provides for an assessment for the physical construction of the drainage after an assessment for damages has been made and such damages paid. The Court's conclusions were arrived at by reasoning from what the Court claims the method of assessment provided for by the statute and by either overlooking the three separate provisions of Section 8458 or by recognizing the three and then placing an *enlarged* drainage and a *maintenance* project in the same category, while in truth the statute places an enlarged drainage and a new ditch in the same category. This Court's conclusion is a misconception of Section 8458 and Section 8467 and the plan of assessment pointed out by the Court seems to be a misconception of Section 8467, which latter section applies *only* to assessments for further costs of the physical contruction of a *new* ditch or its equivalent.

In order to understand what Section 8467 is intended to cover, it is necessary to apply previous sections of the law. A petition signed by the owners of land likely to be affected accompanied by a bond may be presented to the Board and is filed with the County Auditor. (Sec. 8459). Upon the filing of the petition, the County Auditor transmits a copy to the State Engineer, who with the Board inspects the proposed route and if the Board and Engineer deem necessary, a survey is made. When this is made, the County Auditor furnishes a copy of the report to the State Engineer. The surveyor's report is filed with the petition and the Board personally inspect the proposed project and determine the line and width of the ditch, if not fixed in the petition, and fix a

time and place for hearing the petition and give notice thereof, which notice "shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage, to present their claims therefore at such hearing." (Sec. 8461).

At such hearing persons interested may appear and contest the statements of the petition and the surveyor's report as to the width and route of the proposed drainage and after such hearing, the drainage may be established along the line set forth in the petition or findings of the Board or the Board may vary the route or width thereof. If the Board deem it best to vary the route or to change its initial or terminal points "so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the Board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing" and "any persons interested may be heard in the matter of damages or compensation for land and the determination of the Board of County Commissioners shall be final unless an appeal therefrom shall be taken; failure to prosecute such appeal or to appear and contest an award of damages by the Board is to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimant's right to have the same assessed by a jury". (Sec. 8462).

The Board is not authorized to start work or to let any contracts for the same until after the damages caused by the proposed drainage or compensation for the lands to be taken as right of way and spoil banks has been paid for. "After the establishment of the drainage and the *fixing of the damages,* if any, the Board shall fix the proportion of benefits of the proposed drainage among the land affected, and shall appoint a time and place for equalizing the same". (Sec. 8463). "After the equalization of the proportion of benefits, the Board may make an assessment against each tract and prop-

erty affected in proportion to the benefits as equalized, for the purpose of *paying* the *damages* and the *cost* of *establishment* (not construction) *thus* far incurred or to be incurred." (Sec. 8464). "Whenever sufficient money shall be collected, the *damages* occasioned by the construction of such drainage and fixed as herein provided *shall be paid*, and *thereupon* the Board of County Commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same." (Sec. 8465). From the foregoing quotations, it will be observed that after the ditch is established, damages fixed, apportionments made, equalization had, the Board must then make an assessment to pay for the property damaged and property taken for right of way, etc., and that the Board cannot proceed to construct the drainage nor to let contracts for the construction of the same until such damages have been paid. The costs, etc., thus far incurred, are known or are ascertainable but the costs of the construction of the ditch whether by contract or by the County Commissioners, is unknown and unascertainable and as said By Section 8465 when the damages shall be paid, "*Thereupon* the Board shall proceed *to construct* such drainage and let contracts for the construction of the same." It is evident that more than one assessment is ordinarily necessary and required on a new or enlarged ditch, and the Board having established the ditch, made the apportionment, equalized the same, made an assessment to raise money with which to pay the damages occasioned by taking the right of way, etc., and such damages having been paid under such first assessment, that "assessments for further costs" are necessary and must be made to pay the physical construction of the drain. It is for the purpose of paying such additional costs that Section 8467 provides for "assessments for further costs" of construction in addition to the assessment to pay for the damage to property and land taken for right of way. This section clearly has nothing whatever to do with assessments for "maintenance" of a drainage ditch previously established and completed.

It provides that the Board may issue assessment certificates or warrants and that such interest bearing certificates shall be perpetual liens upon the property assessed and enforcible as such first assessment and certificates and that the contractors may agree to take the same in payment of their services or the Board may sell such assessment certificates at not less than par and thereby raise funds with which to pay the costs of the construction of such drainage.

On the other hand Section 8470 being one of the "maintenance" statutes provides that "certificates may be issued (upon assessments made in like manner and upon the apportionment made for the construction of the drain) and such assessment and certificates shall be liens, interest bearing, perpetual and enforcible, in all respects as original assessments and may be sold at not less than par by the Board of County Commissioners or turned over to persons contracting for such cleaning and maintenance or may be collected directly by the Board of County Commissioners."

If Section 8467 was intended to cover the procedure of assessments for maintenance as indicated by the Court's opinion in this case, then we ask, for what purpose would the Legislature include in Section 8470 the above quotation, as the same matter is contained in Section 8467?

Section 8467 is premised upon the first sentence in the same, to-wit: "At any time *after* the *damages* arising from establishment and construction of such drainage are *paid* and the lands for such drainage are taken, assessment may be made for further costs and expenses of construction". And this section further provides that if there are no damages, then only one assessment need be made and provides: "If there be no damages to be paid before taking the lands for such drainage or if the damages have been paid by the proceeds of the sale

of warrants, only one assessment need be made". It is evident from this section and Section 8465 that the payment of damages arising to lands and the compensation to be paid for the taking of lands for right of way, if damages are claimed, is made a condition precedent to their proceeding to construct the drainage and letting contracts for construction. And the payment of such damages contemplates and necessitates a prior assessment. The notice of assesment provided by this section is required in order to fix the due date of such assessment and give the property owner an opportunity to pay the same before its becoming delinquent and thereby save the five per cent penalty as provided by Section 8464, and to give notice to and permit the property owner to exercise his option under Section 8471.

From the foregoing quotations we find that the Board, upon equalization having been had, must then make an assessment based upon such equalization, in an amount sufficient to pay for such damages, surveying, etc., thus far incurred. After this has been done, then for the *first* time the Board is authorized to enter into contracts for the actual construction of the drain and may also after such assessment has been made and the damages paid, make "assessments for further costs" at any time for the further construction costs and expenses of such drain. No time is fixed by the law when this second assessment need be made; it may be made at the time the contracts are entered into or it need not be made until the drainage project is completed but when it is made, it is of necessity made upon the same apportionment and equalization upon which the assessment was made for the payment of damages. This is true because it contemplates the same identical drainage project. For these reasons Section 8467 has application only to the assessments for the cost of a new drainage or its equivalent, and has no reference to maintenance.

By Section 8477, the Board of County Commission-

ers are placed in charge of all drains which must be kept open and in repair by them and "The costs of such drains shall in all cases be assessed, levied and collected *in the same manner* as provided in this article for the construction of drains *originally*"... (See Sec. 8464). Maintenance or repair can mean only to keep in its original state or to replace in its original state. Hence, this section contemplates only the original ditch and territory affected. There is no provision here for a new apportionment and no provision for a new equalization and none is necessary because the apportionment and equalization have already been made and the cost of such maintenance or repair is and must be assessed against the property originally affected in the same proportions as the assessment was made for the construction of the drain.

It frequently happens that drains have been constructed which do not function properly or the original construction has not been fully completed, when it becomes necessary to either make such drain function or at the time of the completion of the drain to clean out the debris collected in that part previously constructed, in each of which cases no assessment has previously been made. Section 8477 provides for these cases as follows "and in all cases when no assessment of benefits shall have been made, the Board of County Commissioners having charge of such drain shall make such assessments", for the cleaning out of the old drain as indicated above.

How shall such maintenance and repair projects be instituted? Section 8470 provides "upon the petition of any person setting forth the necessity thereof and after due inspection by the Board of County Commissioners" and further says "Such assessments shall be made as other assessments for the construction of drainage". (See Sec. 8464). There is no provision here for a new notice to give all persons interested an opportunity to be heard

whether such repair or maintenance shall be done, because by Section 8477, the authority to determine that matter is placed entirely in the hands of the Board of County Commissioners, upon the petition being presented under Section 8470. No new apportionment is provided for because the territory to be assessed and the territory affected necessarily is the territory of the original district, being identical with that upon which the repair work is to be done, and likewise no new equalization is necessary as all parties have had their day in Court as to their apportionment. In all this, however, the law does not contemplate that the ditch is to be made larger or a more efficient drain or affect more territory than that of the original drainage ditch.

Placing the ditch back in its original condition or keeping it there, or in other words, repair and maintenance, does not contemplate more than one assessment being made and does not contemplate the assessments for further costs provided for under Section 8467. That section deals entirely with a new drainage project or that which is equivalent to a new drainage project.

Section 8476 provides: "The powers conferred by this article for establishing and construing drains (Sections 8458, 8459, 8460, 8461, 8462, 8463, 8464, 8465, 8466, 8467, 8468 and 8469) *shall extend to and include* the *deepening and widening of any drains* which have heretofore been or may hereafter be constructed, also to *straightening, cleaning out* and *deepening* the channels of creeks and streams and *constructing,* maintaining, remodeling and repairing *levees, dikes* and *barriers* for the purpose of drainage; but no proceedings affecting the right of persons or property shall be had under this section except upon *notice and the other procedure* prescribed herein for t heconstruction of drains".

Section 8458 says: "The Board of County Commissioners * * * may provide for the straightening or

enlargement of any watercourse or drain previously constructed". How is this done? By the procedure pointed out in Section 8476 supra. What is meant by enlarging a drain, It certainly intends something more than placing the ditch back into or keeping it in its original condition — original width — original depth — original length — in short, maintaining its original water carrying capacity. If such was not the case then there would be no purpose for the two statutory provisions, supra.

The extent to which a ditch can be enlarged is illustrated by the extent of the enlargement in the Sorenson Case (supra), in which the Supreme Court of the State held that the ditch petitioned for was practically a new ditch.

An examination of the South Dakota drainage law discloses that there is no requirement in the construction of a drain, that the complete drainage of a definite area shall be provided for in one project; that there is no mandatory provision requiring a topograhical survey for the entire drainage basin in which a proposed drainage ditch is to be constructed. In fact in this case, one W. H. Lyon was the sole petitioner for the establishment and construction of the old Drainage Ditch No. 1, which was approximately 3 miles in length. Thereafter Drainage Ditch No. 2 starting at a higher elevation and extending into the initial point of Drainage Ditch No. 1, was petitioned for and established and constructed, yet both of these old ditches drained a part of the water collected in the water shed of the Big Sioux Valley and carried by the Big Sioux River. All that is required under the South Dakota law is that one or more owners of land likely to be affected by a proposed drainage, file a petition for a ditch designating therein the proposed route, the necessity therefor, and a general statement of the territory likely to be affected thereby and if these conditions are found by the Board to exist, the ditch may be established and constructed although other lands within the same drainage basin, which require drainage, — and the drainage from which must pass over the same

route as the proposed ditch, — are not provided for by such initiated proceedings. In the case at bar was Drainage Ditch No. 2 a new drain or was it repair or maintenance of No. 1 and the owners of land and property affected by No. 1 only assessable thereof, An examination of the respective petitions of Drainage Ditch No. 1, Drainage Ditch No. 2 and Drainage Ditch No. 1 and 2, and the records of assessments made, as disclosed in this record, show that some of the petitioners for Drainage Ditch No. 1 and 2 were owners of property not included within either of the former old districts. Can it be said that the Legislature intended that the construction of a ditch at the instance of certain property owners draining only a part of a drainage basin or only a partial drainage of such drainage basin should operate, as a bar to the construction of another drainage ditch of greater carrying capacity, with twice the bottom width as the previous ditches, with dikes thrown up on both sides, with controling works built and a more efficient outlet thereto draining a larger territory or making a more complete drainage at the instance of other property owners, although to establish and build such new and enlarged ditch, the line of the same extended along the line of the two older ditches?

Section 8476 gives the same right to those who petitioned for Drainage Ditch No. 1 and 2, to initiate their project, that it gave to W. H. Lyon who petitioned for Drainage Ditch No. 1, and to the petitioners who initiated Drainage Ditch No. 2. There is no provision in the South Dakota law that requires Drainage Ditch No. 1 and 2 to be confined to territory not embraced in Drainage Ditch No. 1, or in Drainage Ditch No. 2, or in both of these former areas. In fact the powers conferred upon the Board by Section 8458 dissipates such a contention, because it expresly autorizes the Board to provide for the enlargement of any drain previously constructed. If it were to be held by any Court that the construction of Drainage Ditch No. 1, or the construction of Drainage Ditch No. 2 exhausted the power granted to the Board

of County Commissioners in that particular area, and that therefore no other or additional drainage ditch can be constructed within such drainage basin, such a holding would hinder the drainage of wet lands and defeat the purposes of the drainage law. This would be equal to holding that a power granted to a Board, once used by the Board, is destroyed. To repair and maintain a ditch does not take into consideration the basic objects and purposes of the drainage law. Such object in final analysis is the complete drainage of lands in the drainage basin.

Keeping water off the land is equivalent to draining the land after water is upon it. That is what this enlarged ditch does to the properties below the old districts. Can it be said that this last mentioned ditch does not drain a greater territory and that it only affects those who are within the original territory? If others are affected and the record in this case shows that there are such, then such others must under the law of the land be given their day in Court as to the confines of that drainage district and the amount of their assessment. For these reasons the Legislature of South Dakota provided by Section 8476 that where a drainage ditch was to be enlarged, deepened and widened and channels or streams straightened or cleaned out or when dikes or barriers were constructed, that all proceedings looking to that end and affecting the right of persons or property shall be had upon like notice and upon like procedure prescribed for the construction of drains and thereby placed the procedure for an enlarged drainage in the same category and class as a new drainage ditch and district.

In the Sorenson Case (supra), the Supreme Court of South Dakota recognized the fact that what is now Section 8458 and Section 8476 are to be read and interpreted together and doing so in that case said: "The petition of the appellants and associates, while not demanding the construction of an entirely new ditch, does

demand an enlargement of a ditch already constructed to such an extent as, in effect, to constitute a drainage ditch and a denial by the board of the application, except to a very limited extent, was in effect a denial of the proposed drainage", and thereafter said, "As before stated, therefore, *in effect,* the appellant and his associ- quires all the procedure of a new drainage project; new ditch of a greater capacity, extending through their lands, to protect them from such overflow as might occur during heavy rains". An enlarged drainage proceeding being by the statute placed in the same class and category as a new drainage project, the enlarged project requires all the procedure of a new, drainage project; new petitions to establish, a new notice of hearing upon the petition, a new fixing of damages, a new apportionment, and a new equalization and assessment and possibly additional and further assessment might be required, as permitted by Section 8467, in the same manner and to the same extent that this procedure is required and necessary in the establishment and construction of a new ditch and district.

Sections 8470 and 8477 furnish to the Board complete authority and instructions to make, spread and collect the assessments required for maintenance and repair work. Both of these sections provide that assessment for maintenance and repair shall be made as other assessments and in the same manner as provided by the law for the construction of drains originally (on the same apportionment and equalization — after notice given in all respects as provided by Section 8464). These sections of the law further provide for the issuance of certificates with which to pay for such repair and maintenance, making such certificates interest bearing, perpetual and enforcible liens in all respects as original assessments and they give to the Board the alternative to either pay for the work with such certificates or they may sell them

and from the proceeds thereof pay for such work. No additional authority or instructions are necessary for or needed by the Board to do the repair and maintenance work on an old ditch and to pay for such work by assessment upon the equalization previously had in such district, after notice is given of the time the certified assessment will be filed with the County Treasurer; thereafter collecting such assessments, all as provided by Section 8464.

No additional authority is granted and no additional instructions are given to the Board by Section 8467 as to the assessments for maintenance and repair work.

Appellants, therefore, respectfully contend that there are three distinct powers granted to the Board of County Commissioners (Section 8458), (1) to establist and construct a new drain, procedure for which is provided by Sections 8458-8469 inclusive; (2) to provide for the enlargment of any drain previously constructed, procedure for which is provided by Sections 8476, 8458-8469 inclusive; and (3) to provide for the maintenance of a ditch, drain or watercourse previously constructed, procedure for which is provided by Sections 8477, 8470 and 8464.

Upon the foregoing showing we respectfully assert that the opinion of this Court dated March 1, 1926, should be withdrawn and a decree entered reversing the judgment and decree of the District Court ordering the vacation of the injunctions granted herein.

Respectfully submitted,

BENJAMIN I. SALINGER,

ELBERT O. JONES,

NORMAN B. BARTLETT,

Solicitors for Appellants.

We hereby certify that the foregoing Petition for Rehearing is well founded in law and fact, and is not filed for delay.

BENJAMIN I. SALINGER,

ELBERT O. JONES,

NORMAN B. BARTLETT,

INDEX.

CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 454.

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS ET AL., APPELLANTS,

vs.

NORTHERN STATES POWER COMPANY, APPELLEES.

RESISTANCE TO MOTION TO DISMISS APPEAL.

WHAT THE QUESTION IS.

A plaintiff sought to enjoin what is said to be in effect an attempt to compel it to contribute to the cost of a ditch project. It has diversity of citizenship. But that is not the sole ground upon which it invokes the chancery jurisdiction. It invokes it also on properly worded constitutional questions raised in its bill. While the trial court holds that these questions are substantial, genuine and not colorable, it held on full consideration that there has been no violation of the Constitution, but still gives decree on the merits to the plaintiff.

Defendant appeals to the Circuit Court of Appeals and plaintiff re-asserts the constitutional questions. The appellate court agrees these are substantial, genuine and not colorable, but declares it can again decree for plaintiff on the merits without deciding those questions—and it does just this. From this decree defendant appeals here—and it is the plaintiff who presented the constitutional questions, and still does not say they are colorable, who seeks to dismiss the appeal to this court. In other words, the issue is on whether a plaintiff who does not invoke the jurisdiction solely on account of diversity, but so presents a substantial Federal question as that when his bill is filed he has created a suit in which appeal may be taken under the Act of March 3, 1891, can, after winning on the merits, insist that the benefit of the Act has been lost to defendant because the lower courts have decided that in fact the Constitution has not been violated. Our position is that *status* as to appealability is fixed by the questions raised in the bill and that said *status* is not affected by the decision of such questions; and that when plaintiff wins the substance and defendant the shadow, plaintiff cannot ask that the actual defeat of defendant shall not be reviewed on appeal because plaintiff's Federal question has been decided against plaintiff.

The Record.

In Paragraph Eighteen of the Bill, this defendant in error (now movant) first avers that a "purported" statute of the State of South Dakota annexed as Exhibit "A," and enforcement of which the Bill seeks to enjoin, is in violation of a state provision of the Constitution of the State of South Dakota. And it continues:

"And in that the same is in violation of the fourteenth amendment of the Constitution of the United States; that said statute Exhibit A is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies or other corporations, and upon the property of municipal and quasi municipal corporations and upon platted property, in cities and villages. Said purported law Exhibit A is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owners to be heard thereon and without notice of any character to the property owners; that if said apportionment of benefits be made as threatened by the said Board of County Commissioners of said Minnehaha County and as is provided in said notice, Exhibit C, the same will constitute the taking of the property of the plaintiff and of the other property owners affected by said notice without due process of law and will deny and deprive plaintiff of the equal protection of the laws." (Printed transcript 14).

In dealing with said plea the District Court said:

"The case made by the bills filed by the plaintiffs in these various actions involves a real and substantial question under the Constitution of the United States, the amount involved in each case is greatly in excess of three thousand dollars exclusive of interest and costs. On the question of the jurisdiction of this court I am of the opinion that each plaintiff states a

> case in his bill plainly cognizable in this court, all of the plaintiffs except the City of Sioux Falls allege diversity of citizenship in addition to the constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this court extends to every question involved whether a Federal or State law, and enables the court to rest its judgment or decree on the decision of such of the questions as in its opinion effectively dispose of the case." (Printed transcript 89).

As seen, the court fully considered the Federal question so raised by said plea (Printed transcript 86, *et seq.*). But it overruled said contention that there was a violation of the Federal constitution and held that notice and opportunity to be heard are provided by the State Statute. (Printed transcript 87). It gave plaintiff an exception "to the order of the court denying the plea of the constitutionality of the drainage statute as applied to agricultural lands." (Printed transcript 100.) It entertained jurisdiction in case 455, in which there was no diversity of citizenship and therein also entered decree for plaintiffs, on the merits.

Risty *et al.* appealed to the Circuit Court of Appeals for the Eighth Circuit. There appellees re-asserted said constitutional question. And the Court said:

> "The constitutional questions raised are grave, serious and doubtful. Their determination is not necessary to the solution of these cases. But because of the reluctance to deciding constitutional questions, "we leave these questions aside." (Printed transcript No. 451, pp. 253, 254.)

BRIEF.

I.

As the right to sue in Federal court must exist before any defense is made, as the Federal question is created by apt and honest allegation in the bill, and as such allegation invokes and causes jurisdiction to attach, it must follow that the status created by the bill governs, as to appealability, no matter what happens after the bill is filed.

It does not matter what Federal question the answer may or does inject.—Colorado Central, 150 U. S. 138; Shulthis, 225 U. S. 561.

The inquiry as to Federal jurisdiction must be limited to the time at which the bill is filed. The jurisdiction must be made to appear at the outset. Therefore, it does not matter what develops in the course of the proceedings—Borgmeyer, 159 U. S. 408—say, the arising of an additional Federal question.—Boyse, 230 U. S. 98; *Ex parte* Jones, 164 U. S. 691; Third Street Co., 173 U. S. 457.

The allegations of the bill invoke and cause the attaching of jurisdiction.—Huguley, 184 U. S. 297; Vicksburg, 231 U. S. 259.

The test on whether it has attached is whether the necessary facts were made to appear when jurisdiction was invoked.—Colorado Co., 150 U. S. 138.

Say as to diversity, for illustration—the applicability of the Act of March 3, 1891, is to be determined by the showing made in the summons and the filing of claim or declaration. —Borgmeyer, 159 U. S. 408.

1-a.

If the allegations of the bill create, and if because of them jurisdiction has attached—Colorado Co., 150 U. S. 138; City

of Fergus Falls (C. C. A.), 72 Fed. 883; Lovell, 227 U. S. 412; *Ex parte* Jones, 164 U. S. 691.—If, so, the jurisdiction has become complete—Loeb, 179 U. S. 472—it must follow that the jurisdiction *remains* complete, and that the nature of the suit remains for all purposes what the bill made it—including all rights to appeal that exist in such a suit.

The jurisdiction is determined by the allegations of the bill.—Shulthis, 225 U. S. 561; Colorado Central, 150 U. S. 138.

It depends on these allegations and not upon the facts as they subsequently turn out to be.—City *v.* Railway, 166 U. S. 319. Jurisdiction having so attached, it cannot be affected by subsequent developments. The inquiry goes to the time when the suit is commenced.—Colorado Central, 150 U. S. 138.

And as without such allegations there is no right to use the Federal Court, and they alone create that right—see also Metcalf, 128 U. S. 588; Florida Co. *v.* Bell, 176 U. S. 321; State *v.* Tennessee, 152 U. S. 454—it must follow that those allegations fix the Federal right and the nature of the suit.

1-*b*.

It is the presentment and not the decision of the Federal question that controls on appealability—Lovell, 227 U. S. 412. And if on one question the judgment of the Circuit Court of Appeals is final and on another is reviewable, the reviewable question controls—MacFadden, 219 U. S. 288; 31 Sup. Ct. 240.

All that is necessary is a good faith claim that a contract is being impaired—a good claim as to, a constitutional ques-

tion—City *v.* Ry., 166 U. S. 653; Penn Co., 168 U. S. 685; Chappell, 160 U. S. 499, 509; Sperry, 264 U. S. 488; 44 Sup. Ct. 372.

One test is whether it appears from the plaintiff's own statement in legal and logical form such as is required by good pleading that a substantial Federal question dispute exists—American Sugar Refining Co., 161 U. S. 277.

And the validity of the claim set up is not the test.—Southern Pacific Ry., 118 U. S. 109.

The jurisdiction does not depend on the validity of the claim set up but on the fact that the claim involves a real and substantial dispute.—Nashville (C. C. A.), 86 Fed. 169.

It is elementary that though diversity be set forth, appeal lies under the Act of March 3, 1891, if in addition other Federal questions are properly raised in the complaint.—Warner, 191 U. S. 195; 24 Sup. Ct. 79 (in which, by the way, it was the bill of plaintiff that was dismissed). Huguly, 184 U. S. 297; Amato, 144 U. S. 465.

The judgment is not final where in addition to diversity there are Federal questions which appear in the record by a statement in legal and logical form such as good pleading requires.—Telegraph Co. *v.* Railroad, 178 U. S. 238.

It suffices to sustain the appellate jurisdiction if it is claimed in a way that is not colorable, but is real, that the law of a state is in contravention of the Federal Constitution. And it does not suffice to assert that the claim as alleged in the bill is legally unsound.—Penn Co., 168 U. S. 685.

The questions, here, were not colorable, and movant does not deny that they were honest and substantial questions—and the whole record stamps them to be that.

The attitude of both the lower courts in attesting to the genuineness and substantiality of the questions is of the highest importance.—City *v.* Ry., 166 U. S. 653.

These questions are substantial because they assert oppressive discriminatory legislation—Nashville (C. C. A.), 86 Fed. 178, 179—and assert unequal exactions and taxation.—*Idem.*

And such questions are not frivolous when as here they require analysis and exposition for decision.—Milheim, 262 U. S. 710; 43 Sup. Ct. Rep. 694.

1-*c*.

Nor may movant have the effect it contends for from the fact that the lower courts could find for it on the merits, though they held against it on the merits of the Federal question presented by it. First, because it is not vital on appealability how that question was decided, and, second, because it is not vital on appealability that the decision did not turn on said question.

The jurisdiction does not depend upon the outcome. It suffices that if the claim on the merits failed the Court may be turned to the Federal question—that if it appears in any aspect which the case may assume that the right of recovery may depend upon a construction of Federal acts; and if the Federal claim is not merely a colorable one, but rests upon construction of the Constitution, there is a Federal question which is adequate.—St. Paul Railway, 68 Fed. 2 (C. C. A.).

It does not matter that there is sufficient allegation of diversity and that relief is asserted on another ground which does not involve the consideration of a Federal question. It does not matter, so far as jurisdiction is concerned, that the Court may not be compelled to construe an Act of

Congress; for its jurisdiction does not depend on the nature of the question that is ultimately decisive of the plaintiff's right to recover.—St. Paul Railway (C. C. A.) 68 Fed. 4.

It may be conceded the rule is that the statement of the plaintiff must exhibit the Federal question to be a necessary part of his claim. But, as construed, this but means that in some phases that a case may develop, the claimant will be driven to rely on this Federal question.—Weir, 216 U. S. 607.

It is said to be elementary that there is a Federal question if "it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or sustained by the opposite construction."—Southern Pacific Ry. 118 U. S. 109.

It suffices that in some aspect which the case might assume the right to recover may depend on the construction of Federal statute. It being apparent that the claim is not merely colorable.—St. Paul Ry. *v.* Ry. (C. C. A.) 68 Fed. 2.

It does not exclude the jurisdiction that questions are involved which do not at all depend on the Constitution. It is enough that the constitutional question is an ingredient of the original cause, although other questions of fact or of law may be involved.—Railroad *v.* Mississippi, 102 U. S. 141.

I-*d*.

Plaintiff having injected an appealable Federal question, the Appellate Court gets the whole case, whether the ultimate decision turns on the merits or on Federal or on local law—and in number 455, one of the six cases with which the one at bar was tried, the lower courts decreed for plaintiff on the merits, though there was no diversity, and though it was defeated on its only Federal question (the additional one raised in the case at bar).

Where the constitutionality of an Act of Congress is drawn in question, the Appellate Court has power to dispose, not merely of the constitutional question, but of the entire case, including all questions whether of a jurisdictional question or of the merits.—Chappell, 160 U. S. 499, 509.

In the case of Spencer, 191 U. S. 526, the Appellate Court reversed a decree in favor of the plaintiff Spencer. It is there held that the appellate jurisdiction is not limited to the constitutional question, but extends to the determination of the whole case.

There is not a limitation to the constitutional question, but the review includes the whole case.—Loeb, 21 Sup. Ct Rep. 178; citing Whitten, 160 U. S. 231; Penn. Co., 168 U. S. 685.

Under section five of the Act of March 3, 1891, if constitutionality is drawn into question, the Supreme Court acquires jurisdiction of the entire case and of all questions involved in it and not merely of the question of constitutionality of the law of the United States.—U. S. *v.* Horner, 143, 570, 576.

If the case presents a Federal question, there is jurisdiction over the whole case and decision is not limited to merely deciding the single Federal question.—Omaha Horse Railway Co., (C. C. A.) 32 Fed. 729, 730; Horner, 143 U. S. 570; Chappell, 160 U. S. 499; Press, 163 U. S. 700.

If on the face of the complaint a Federal question is presented the Court has the right to decide every issue that may subsequently be raised whether the decision ultimately turns on Federal, local or general law, and jurisdiction is not affected.—St. Paul Railway (C. C. A.) 68 Fed. 10; citing Mayor, 6 Wall. 247; Railroad *v.* Mississippi, 102 U. S. 135, 141; Tennessee *v.* Davis, 100 U. S. 257, 264; Horse Railway Co., 32 Fed. 727 (C. C. A.); and see City of Fergus Falls (C. C. A.), 72 Fed. 883.

The case was brought directly to this court, because the constitutionality of the statute was drawn in question. The question has since been settled adversely to plaintiffs in error. Hoke *v.* United States, 227 U. S. 308. Nevertheless, we must retain jurisdiction for the purpose of passing upon the other questions in the record.—Horner *v.* United States, 143 U. S. 570, 576; Burton *v.* United States, 196 U. S. 283, 295; Williamson *v.* United States, 207 U. S. 425, 432; Wilson *v.* United States, 232 U. S. 563; 34 Sup. Ct. Rep. 348.

1-*e.*

The plaintiff cannot be allowed to say that his own failure to sustain a Federal question claim denies defendant an appeal when plaintiff might have sustained an appeal—that defendant can be deprived of the substance by being given a shadow. For this we cite the Loeb case, 179 U. S., 472:

If the lower court had adjudged against the constitutional question raised by defendant and had given a judgment for plaintiff, the one who raised the constitutional question could have brought the case to the Supreme Court. If that party on denial of its claim could invoke the jurisdiction of the Supreme Court, there is no principle on which the plaintiff can be denied the like privilege if the State law upon which his action depended was on the claim of his adversary held to contravene the Constitution. This right cannot be limited to being possessed of but one of the parties.

It is the unsuccessful litigant who may come to the Supreme Court directly from the Circuit Court in every case where the claim is made that the State law contravenes the Constitution.

It is unnecessary that the writ shall be sued out by the party that made the claim of Federal jurisdiction.

No matter which party claims rights or protection under the Constitution, that is decisive as to jurisdiction, and all questions may then be reviewed in the Appellate Court.—Mayor *v.* Cooper, 73 U. S., 252, 253.

1-*f*.

Movant having prevailed on the merits is in no position to have a decision here on how its Federal question ought to be decided, or to say it is no longer of consequence. But, passing that, it may not have a motion to dismiss determine the validity of its contentions.

It is not required that a constitutional question asserted shall be a well-founded claim. Whether it is meritorious must be decided on the merits after jurisdiction is taken.—Penn., Co., 168 U. S. 685, citing Horner, 143 U. S. 570.

It is sufficient that a genuine Federal question is claimed to exist and it is not essential that the claim be well founded. That is a question that must be decided after the court takes jurisdiction.—Nashville (C. C. A.), 86 Fed. 178, 179, and cannot be raised by motion to dismiss.—Chicago Life Co. *v.* Needles, 113 U. S. 574, and see Cohen, 6 Wheat. 264.

It is but necessary to show that the complainant claimed in good faith to have a contract which the other party had attempted to impair. Whether it was in fact impaired may not be tried out on motion to dismiss, where the claim in the bill was that the action of the city had that effect. It suffices that the bill presents a constitutional question, irrespective of the actual sufficiency of the facts alleged to justify the relief sought or of the facts as they may subsequently turn out.—Pacific Co., 194 U. S. 112.

II.

Movant relies upon detached excerpts in disregard of what the cases cited from decide. On its interpretation its citations would overrule the elementary law to which we have called attention, and overrule a very large number of decisions in this and the lower Federal courts, hitherto unquestioned, and do so without so much as mentioning those decisions.

And nothing found in what it cites can be strained into holding that where a plaintiff so presents Federal questions as that the invoking of jurisdiction does not rest on diversity alone, such plaintiff can dismiss the appeal of defendant who has lost on the merits, merely because the lower court had decided that while the Federal question presented by plaintiff was substantial, genuine and not colorable, plaintiff could not prevail upon it.

Let us turn to what movant relies upon.

Arbuckle—191 U. S. 405.—(Brief — 6)—In that case it is said that a right to a hearing *does* arise if there be a substantial controversy "upon the determination of which the case depends." It is *not* said that there is no right to appeal under the Act of March 3, 1891, *unless* there is not only a substantial Constitutional controversy, but one upon which the determination of the whole suit depends. No such limitation is found in the Act. To put it in by court action would overrule the decisions that it suffices if the case *might* take a turn that would make it necessary to decide the Federal question; and the decisions that if the question is substantial it does not matter, so far as the right to appeal is concerned, how the question was finally dealt with below; and the decisions that the presenting of such a question authorizes decision on matters other than such question. What the case *decides* is that *plaintiff who was dismissed* had failed to raise a substantial Federal question—that none such "appears on the record by a statement in legal and logical form such as is

required in good pleading." Hardly a decision that plaintiff may have the appeal of defendant dismissed because the court decided against plaintiff a substantial Federal question presented by plaintiff—hardly a decision that the Act does not mean what it says, to-wit; that appeal is denied only where the *sole ground presented* is diversity of citizenship.

2-*a*.

Defiance Water Company—191 U. S. 184.—(Brief — 6)—The only claim of Federal jurisdiction was a claim by the Water Company against the City that the obligation of a rental contract with the City was impaired by an ordinance which, though it denied the validity of the contract, still allowed the claim for rentals with a saving clause to prevent estoppel. The Federal question is held to be colorable, and the circuit court of appeals had ordered a dismissal of the bill.

2-*b*.

Shulthis v. McDougal—225 U. S. 561.—(Brief — 7)—Some language as to "the determination upon which the result depends." The *decision* is that no ground of Federal jurisdiction is sufficiently set forth. And it was the complainant who was ruled against.

2-*c*.

Lovell v. Newman—227 U. S. 412.—(Brief — 7)—Some more language upon "right to recover depends," and it, too, deals with the plaintiff. The *decision* is that he had not asserted a substantial Federal question.

2-*d*.

Empire Co. v. Hanley, 198 U. S. 292.—(Brief — 7)— Some more and kindred detached words, and a deduction from them that this appeal should be dismissed because "the Federal questions pleaded here were not those upon the determination of which the final result depended." Another disregard of the rule that if the question be substantial, the decision upon it will not oust the right to appeal created by the presenting of the question, nor exclude decree for the one whose Federal question is finally decided against him. The *Hanley* case is another in which the *decision* is, simply, that nothing is raised that authorizes appeal under the Act of March 3, 1891. The following statement by this Court makes that plain.

The averments of this complaint did not suggest that the courts of Idaho would hold the proceedings of the probate court if attacked by Hanley directly, effectual to overthrow his purchase, or charge that by taking any such action as had been taken they had committed error so gross as to amount in law to a denial by the State of due process of law; Hanley's contention was in effect that the lower proceedings were void for lack of jurisdiction, and he did not pretend that he could not have obtained redress by direct suit in the State courts. The Constitution and laws of the United States were not mentioned in the complaint, nor was any dispute or controversy raised as to the effect or construction of the Constitution or laws, nor was any privilege or immunity specially set up or claimed under the Constitution or law; that if this had been a writ of error to said Court, the averments would not have brought it within Section 709 of the Revised Statutes, and if it had been a direct appeal from the circuit court under the Act of March 3, 1891, it could not have been sustained

because the construction or application of the Constitution of the United States was not distinctly presented for decision in the court below.

2-*e*.

Henningsen, 208 U. S. 404.—(Brief — 8)—The circuit court had affirmed decree of the court below enforcing the right of a surety on the bond of a public contractor for first lien upon sums due under the contract.

It was said here:

A motion is made to dismiss on the ground that the jurisdiction of the circuit court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the circuit court of appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and for relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the circuit court of appeals, and were necessary elements.

As seen, the appeal was entertained. In so doing this Court said: "Those statutes entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements."

We have exhibited above what *was decided.* But because the quoted words state the fact to be that certain elements were vital ones and entered into the decision, movant deduces that there can be no appeal where the Circuit Court of Appeals affirms a holding that a certain question is grave and substantial, itself declares this to be true, but finds it unnecessary to decide that question for itself. But be all that as it may, the quoted words are mere argument, or, rather,

one argument in support of the grounds upon which the *decision* rests. Such words so spoken, should not be the means of overriding the settled law which permits the appeal at bar.

2-*f*.

Cary Co. v. Acme, 187 U. S. 427.—(Brief —10)—The Acme Company brought suit in the trial court for alleged infringement of letters patent which went to decree sustaining the validity of the patent and adjudging that the Cary Company had infringed it. The defendant appealed to the C. C. A. and there was an affirmance. Subsequently, proceedings in contempt were instituted by the Acme Company to punish alleged violation of the injunction issued by the decree. A fine of $2,000 was imposed. The Cary Company sued out a writ of error from the Circuit Court of Appeals to review its judgment and there was an affirmance. Thereupon, writ of error to the Supreme Court of the United States was allowed. It was said by the Court:

Judgments and decrees of those courts in all cases arising under the patent laws and under the criminal laws are made final by section 6 of the judiciary act of March 3, 1891. Although it is conceded that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under section 5 of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court.

The decree at bar is not one in a patent case; nor is it a judgment in a criminal cause, made final by the Act.

And defendant could not have gone directly to this court. The direct appeal is available only where the jurisdiction of the district rests solely on a Federal question. It is no more available where diversity also exists than in a case wherein diversity is the sole ground upon which jurisdiction is invoked.—See American Co. *v.* City, 181 U. S. 279; Cary, 187 U. S. 211; Watkins, 118 Fed. 532; Huguly, 184 U. S. 452. And it is where the jurisdiction rests on diversity and the *defendant* injects a constitutional question, that he may take direct appeal. American Refining Co., 161 U. S. 277; 21 Sup. Ct. 647.

Again, it cannot be that the taking appeal to the Circuit Court of Appeals destroys the right to appeal to this court. For appeal *does* lie from the decision of that court to this; and one cannot appeal from the Circuit Court of Appeals unless he first enters it. In other words, since the Act of March 3, 1891, permits appeal here to any who enter the Circuit Court of Appeals where diversity is not the sole basis of jurisdiction, then, if entering that court takes away that appeal, the statute means nothing.

Where the plaintiff injects the constitutional question and is defeated on it, it is no waiver of rights under the Act of March 3, 1891, that thereupon direct appeal was not taken to the Supreme Court.—Northern Pacific Co., 113 U. S. 574; 12 Sup. Ct. Rep. 742.

2-*g*.

Ayres v. Polsdorfer, 187 U. S., 427.—(Brief 11.)—The headnote clearly expresses the essence of the decision, to-wit: that where, below, jurisdiction is invoked solely on the ground of diversity of citizenship there may not be a review in the Supreme Court on writ of error because a Fed-

eral question arose in the course of the proceedings, even though it be a question which could not be brought directly from the Circuit Court to the Supreme Court.

The declaration of Polsdorfer alleged ownership, possession and entry of defendant Ayres. It invoked the Federal jurisdiction *solely* on the ground of diversity of citizenship. There was verdict and judgment for the plaintiff Polsdorfer. Ayres sued out a writ of error to the Circuit Court of Appeals and the writ was dismissed in that court on the motion of Polsdorfer and on the ground that there had been no summons and severance of the defendant, Price. This being the bill, it is manifest that whatever Federal question got into the case must have gotten into it after the filing of the complaint setting up diversity of citizenship only.

For the right to appeal to the Supreme Court from the action of the Circuit Court of Appeals, the argument was in effect that the Federal question *arose in the course of the proceedings in the trial court,* consisting, as is claimed, upon a basing on grants of land from different states and a conflict between the grants under which the parties respectively claimed title—it is held that this did not make a non-final judgment—which is but affirming that the *status* at the time the complaint is filed is what is controlling. It is merely an affirmance of the Turck case, 150 U. S. 138. For the Turck case, the Ayres case says:

In it the jurisdiction of the trial court was invoked on the ground of diversity of citizenship, but defendant claimed to have set up in defense a Federal question arising under Section 2322 of the Revised Statutes, and on that ground insisted that the judgment of the Circuit Court was not final; that this contention was rejected, and the Supreme Court held that before such defense under this statute had

been set up jurisdiction had "already attached and could not be affected by a subsequent defense;" that jurisdiction "depended entirely upon diverse citizenship when the suit was commenced and to that point of time the inquiry must necessarily be referred."

It is added that the same idea was expressed in subsequent cases, though in somewhat different language.

Lampasas, 180 U. S. 276.—(Brief 13.)—This case and its reference to *Clark's* case, 176 U. S. 114, but affirms the self-evident proposition "that the objection of the unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance." Why movant thinks this is relevant is set forth as follows:

> "If there was a grievance involved in the disposition of the Federal question raised in the lower courts, that grievance belonged to appellee, and appellants were strangers to it. Indeed, they were the direct beneficiaries of the disposition of those questions, when they were set aside by the lower court." Brief 14.)

Of course, this again disregards that the right of appeal depends on whether or not diversity *only* was *presented*, and not on how grounds other than diversity were decided. And it is a complete "swap" of a stone for bread. Plaintiff brings and holds defendant in court by so presenting substantial grounds for invoking jurisdiction as that diversity is not the *sole* ground. Some of these grounds are decided against plaintiff, but still the decree on the merits goes against defendant. Yet defendant is "a direct beneficiary" (one wonders in what way), and it is the victorious plain-

tiff who alone has been "aggrieved." That is, its "grievance" is that it won its whole case, but won it on one of its claims instead of another, or did not win on all of its reasons for demanding victory. And the defendant who has lost everything of substance is a "stranger" to all "grievance," and is in the position of one who attacks a statute for unconstitutionality when that statute in no way affects him.

It was rightly said in the *Hanley* case that appellant was making a grievance of its success; and movant urges the words against defendants, but they are relevant only to the position taken by movant. That position is in essence that because movant won the substance but lost an "argument for jurisdiction," asserted wholly to enable the court to give it the substance, such "defeat" entitles it to take from the truly defeated party a right to review which that party would have had if it had been defeated both on said "argument" *and* the substance. To have many such victories as defendants had would place them with Dickens' ruined "Fortunate legatee." And on the theory of movant its "grievance" through its academic defeat is truly an asset. And it claims a preference which we submit it is not entitled to unless the *Loeb* case is to be overruled and it is to be held that in the right to appeal the parties are not equals. That is to say,—when the bill was filed it created the right of appeal under the Act of 1891 for all parties. Now, had plaintiff lost the substance *and* its Federal question its right to appeal would have remained. Had defendants lost *both* substance and the Federal question they would have had the right to appeal. So, if the decision had rested solely on finding the Federal question for plaintiff. And in that case defendants would have been heard here on the substance, too. But they are not to be

heard at all under the Act because, foresooth, they lost the substance but won on one ground put in solely to enable the court to defeat them as to the substance.

2-*i*.

For some reason, reliance is had on the case of *Loeb*, 179 U. S. 472. The argument is against the position of movant. It points out it was asserted in the Loeb case that review of the judgment of the highest court of a State can be had *only* by the one who in that court made claim under the Constitution. This court held against that contention, and said:—Brief — 14)—

> "In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant."

And in the Loeb case, the attack was on and not by the plaintiff. This, standing alone, surely does not sustain movant. But the point urged seems to be that this, plus *Louisville v. Telegraph Co.*, 234 U. S. 369, establishes that all that was available after the Federal question was decided against plaintiff was *it* had the right to direct appeal to this court. Of course, the Loeb case does not hold that, and the *Louisville* case holds but this:

> "On a direct appeal under section 238, Judicial Code, from a judgment of the District Court dismissing the bill for want of jurisdiction on the ground

that neither of the parties was a resident of that district and that the suit was one that could only be brought in a district in which one of the parties resided, this court is only concerned with the jurisdiction of the District Court as a Federal court; whether appellant is entitled to the relief sought is not a jurisdictional question in the sense of section 238."

"When the matter in controversy is of the requisite value and diverse citizenship exists, the question is simply whether the case is cognizable in the particular District Court in which the case is brought."

2-*j*.

Robinson v. Caldwell, 165 U. S. 359.—(Brief — 10)— Caldwell brought suit in State court against Robinson and claimed to be the owner of certain lands in Idaho, the complaint stating that the validity of his title depended partly, if not altogether, upon the construction of the treaty between this Government and the Nes Perces Indians. It also appears there was drawn into question the constitutionality of an Act of Congress. Robinson had the cause removed, and in Federal court it was heard on the merits. There was final decree adjudging Caldwell to be the true owner of certain lands described in the complaint and quieting his title against Robinson. Robinson was allowed to appeal to the Supreme Court. He also prosecuted an appeal to the Circuit Court of Appeals which determined his case against him on February 4, 1895, and the citation on the appeal to the Supreme Court was for July 1, 1894. The opinions in both lower courts considered all the questions requiring construction of the treaty and involving the validity of said Act of Congress. The appeal

involved in the Robinson decision here was brought to the Supreme Court directly from the final decree in the Circuit Court of the United States. The holding is that one may not take appeals on a whole case both to the Supreme Court direct and also to the Circuit Court of Appeals, and that where the Circuit Court of Appeals affirms on the merits and decides all the questions raised, then, by invoking the jurisdiction of the Circuit Court of Appeals on the whole case, defendant waives his right to a decision by the Supreme Court on his direct appeal to it and the latter appeal must be dismissed. It is as to this that the court wrote the extract upon which movant relies:

> "It was not the purpose of the Judiciary Act of 1891 to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits, both in the Supreme Court and in the Circuit Court of Appeals. As no question of jurisdiction was certified by the Circuit Court, and as the defendant chose not to await the action of the Supreme Court upon the appeal to it from the Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals on the whole case, he must be held to have waived his right to any decision by the Supreme Court on his direct appeal from the Circuit Court."

Of course, these words must be read in the light of the record upon which they were uttered, and, thus read, they have nothing to do with a case where a plaintiff is seeking to take away appealability because a Federal question raised by him has been decided against him.

2-*k*.

Anglo-American, 191 U. S. 376.—(Brief — 15)—More detached excerpt. The headnote states the *decision* well:

> "When the Circuit Court has decided the question of its jurisdiction and the alleged unconstitutionality of a state law in favor of the plaintiff, but has decided against him on the merits, the *plaintiff* cannot appeal directly to this court under the act of March 3, 1891, chapter 517, section 5, for the purpose of a revision of the judgment on the merits.

In other words, there was in that case no basis for *direct appeal to this court from the action of the trial court.* No such appeal is being attempted by us.

In a word, the jurisdiction was not based *solely* on diversity. Therefore, appeal lies under the Act of March 3, 1891.

What appellee seeks is the right to elect and regulate as to whether its suit may be brought here. If it be defeated in the C. C. A. the suit can be brought higher. If it be victorious in that court, then it claims the right to in effect amend by changing the bill to rest on nothing but diversity, and so to stop further appeal.

We submit respectfully that the motion should be overruled.

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E. O. JONES,
N. D. BARTLETT,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. 98

[illegible]

vs.

NORTHERN STATES POWER COMPANY, [illegible]

[illegible]

[illegible]
Counsel for [illegible]

[illegible]
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted] 95

A. G. RISTY, et al, as County Commissioners, etc., et al,

Petitioners,

CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, IN RESISTENCE TO PETITION FOR WRIT OF CERTIORARI.

W. F. DICKINSON, Chicago, Ill.
THOMAS D. O'BRIEN, St. Paul, Minn.
ALEXANDER E. HORN, St. Paul, Minn.
EDWARD S. STRINGER, St. Paul, Minn.
Counsel for Respondent,
Chicago, Rock Island and
Pacific Railway Company.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 451.

A. G. RISTY, et al, as County Commissioners, etc., et al,

Petitioners,

CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, IN RESISTENCE TO PETITION FOR WRIT OF CERTIORARI.

Petitioners seek a writ of certiorari to review the decision of the Circuit Court of Appeals of the Eighth Circuit. For the opinion written by Judge Kenyon, see Risty vs. Chicago, Rock Island and Pacific Railway Company, 297 Federal 710, which affirmed Chicago, Rock Island and Pacific Railway Company vs. Risty, 282 Fed. 364.

Petitioners advance five reasons for the granting of the writ. All but the first are so clearly and

conclusively disposed of contrary to petitioners' contention, by Judge Kenyon's opinion as to require nothing further than a reference thereto.

COPY OF THIS OPINION IS MADE A PART OF THIS BRIEF AS AN APPENDIX, PAGES 8 TO 39.

I.

Petitioners claim that there is such conflict between Risty vs. Chicago, Rock Island & Pacific Railway Company, 297 Fed. 710, the decision below, and Gilseth vs. Risty, 193 N. W. 132 by the Supreme Court of South Dakota, as to justify a writ. *There is in fact no conflict between the two cases as an analysis will show.*

Some years ago the County Commissioners established Drainage Ditch 1, levying an assessment upon certain adjacent property. A few years later the Commissioners established another ditch known as Drainage Ditch 2, likewise levying an assessment for this ditch upon adjacent property. Ditch 1 and Ditch 2 were physically connected and in reality constituted one ditch, although established separately.

While the terminology may not be accurate because in fact no assessment districts were ever established, as is pointed out by the Circuit Court of Appeals in its opinion, we shall, for the convenience, refer to the property which was assessed for the establishment of Ditch 1 and Ditch 2 as the old assessment district.

This respondent, the Rock Island Railway Company, had no property whatever in the old assess-

ment district, and was not assessed for the construction of either Ditch 1 or Ditch 2.

In 1916 the spillway connecting Ditch 1 and Ditch 2 with the Sioux River washed out. A very large expenditure was required to make these ditches function at all.

The Board conceived the plan of establishing a new ditch which it was pleased to call "Ditch 1 and 2". This ditch, so-called, was established over the identical route traversed by Ditch 1 and by Ditch 2, and the only work done in building it, was to clean out and widen the old ditches, and rebuild the spillway. The Board proposed to assess for this ditch, so-called, not only all property included in the old assessment district, but also certain additional property, which additional property will be designated, for convenience, the new assessment district.

The Rock Island, this respondent, had, as indicated, no property in the old assessment district but did have property within the new assessment district. Respondent had no notice of any intention to assess its properties, within the new assessment district, until the tentative assessment was made.

The Board having made a tentative assessment, of over $8,000, this suit was brought seeking an injunction against further action looking towards assessment of respondent's properties. Jusisdiction was based on diversity of citizenship,—the Rock Island being an Illinois corporation and the defendants (petitioners here) residents of South Dakota

and upon the asserted unconstitutionality of the South Dakota drainage statute.

Judge Elliott, judge of the lower court, held that the establishment of "Ditch 1 and 2" was a mere subterfuge for repairing Ditch 1 and Ditch 2, and for assessing additional property for such repairs *when the South Dakota law* (Section 8740 Revised Code of South Dakota for 1919) *limited assessments for repairs to the property originally assessed for construction.* Judge Kenyon on appeal expressed a similar view.

The district court entered a decree enjoining any assessment against any of this respondent's properties as all of its properties lay outside the old assessment district. This decree the circuit court of appeals affirmed.

The decree did not enjoin or restrict or in any way deal with the right of the Board to assess property within the old assessment district.

On the other hand, the South Dakota Supreme Court in the Gilseth case had before it for determination the validity of an assessment for Ditch 1 and 2 *upon property lying within the old assessment district.* The court was careful to say (page 133):

> "Plaintiff * * * was the owner of agricultural land within the drainage area of Drainage District No. 2".

The South Dakota Supreme Court reached the conclusion that the particular assessment for Ditch 1 and 2 upon property in the old assessment district, should be upheld because:

1. Even assuming the project to be the repair of the old ditches and not the construction of a

new one, still an assessment for repairs was proper under the constitution and statutes of South Dakota *upon the land originally assessed,* (Sections 8458 and 8470).

2. The land owner, the plaintiff in that case, was estopped to question the assessment, he having acquiesced and participated in the proceedings. A reading of the opinion makes it apparent that this was the real reason for the decision.

The South Dakota Supreme Court, therefore, upheld at most the validity of an assessment upon land *within the old district.* It is therefore apparent that there is absolutely no conflict between the holdings of the two courts.

Taking the view most favorable to petitioner and eliminating entirely the question of estoppel, the most that could be claimed for the decision of the State Supreme Court, is that, the *court held that land WITHIN the old district COULD be assessed for Ditch 1 and 2.*

The Federal Circuit Court of Appeals held that land WITHOUT the old district COULD NOT be assessed for Ditch 1 and 2.

The rule of conflict of decision so strongly urged by petitioners is not in the case at all.

Eliminating this proposition, there is nothing in the case which would call for or justify certiorari, even if this court were of the opinion that the decision of the Circuit Court of Appeals was wrong on the merits. However, nothing could be added to Judge Kenyon's opinion to demonstrate that the decision on the merits was correct. The only ques-

tion determined by the Court below was the construction of the South Dakota Drainage Statute, and a determination of the facts applicable. There is no Federal question in the case now. There was a very serious Federal question at the inception of the case, namely: the validity of the drainage statute under the Due Process of Law clause of the Federal constitution. This Federal question was expressly decided in petitioners' favor in the District Court by Judge Elliott; the Circuit Court of Appeals expressly refused to determine the question on the ground that it was unnecessary to the decision. *The Court below determined only the construction and not the validity of the state statute.* It is apparent that it was the intention of Congress to leave the final determination of such a question to the Circuit Court of Appeals. Section 128 of the Judicial Code.

II, III, IV and V.

We shall not attempt to follow petitioners' brief through the arguments upon these propositions. These portions of the brief deal with the jurisdiction of the Court below, it being claimed, as we understand it, that there was a plain, adequate and complete remedy at law, that there was no equity in the bill, that the action was premature, and that the necessary jurisdictional amount was not involved. All of these questions were carefully and exhaustively considered by the Circuit Court of Appeals and determined contrary to the conten-

tions now made by petitioners. Nothing could be added in support of the conclusion reached by the Circuit Court of Appeals and to the convincing reasoning by Judge Kenyon.

It is apparent that this application has no merit and it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX.

297 Federal 710.

RISTY et al. v. CHICAGO, R. I. & P. RY. CO., and five other cases.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1924.)

Nos. 6312-6317.

1. Constitutional law—46(1)—Federal courts will not pass on constitutionality of statutes unless absolutely necessary.

Federal courts will not pass on the constitutionality of statutes unless absolutely necessary.

2. Drains—71—County commissioners held without authority to take in lands not benefited in assessing cost of repairs and maintenance.

Where a river broke through a natural barrier and flowed into drainage ditches and because of the inadequate construction of the ditches washed out a spillway, leaving the water uncontrolled, and threatening serious damage where the water emptied over a steep bluff into the river, the county commissioners could clean and maintain the ditches under Rev. Code S. D. 1919, § 8470, or abandon the ditches and construct new ones in the same location by complying with section 8489; but they had no power, by pretending to abandon the ditches, to assess part of the cost of maintaining and repairing the old one on lands outside of the original drainage district in no way benefited thereby.

3. Drains—2(3)—Draining of other than agricultural lands must be by drainage districts established under legislative authority.

Under Const. S. D. art. 21, § 6, drainage of lands for any public use other than the drainage of agricultural lands must be carried out by drainage districts established under legislative authority.

4. Courts—262(2)—Federal equity court cannot give relief where there is "plain, adequate and complete remedy at law."

Under Judicial Code, § 267 (Comp. St. § 1244), federal equity courts cannot give relief where there is a "plain, adequate and complete remedy" at law, but the remedy at law must be as certain and efficient as that in equity.

5. Court—262(2)—Remedy in federal court necessary to defeat suit in equity; "remedy at law."

The "remedy at law" which will prevent the bringing of a suit in a federal court of equity must be a remedy on the law side of the federal court, and not a remedy in the state courts.

6. Courts—262(2)—Landowner's remedy at law for illegal drainage assessments held inadequate.

Where the only remedy against unauthorized drainage assessments was to appear before the county commissioners and to appeal from their finding to the state, *held*, that the remedy at law was inadequate under Judicial Code, § 267 (Comp. St. § 1244).

7. Taxation—498, 608(2)—Right to restrain assessment or collection of state tax for illegality must be clear.

A suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal, but there must be special circumstances bringing the case under some recognized head of equity jurisdiction, and the right to such relief must be clear where court is asked to restrain collection of a state tax.

8. Taxation—498—An assessment putting cloud on title gives rise to equitable jurisdiction.

An assessment putting a cloud on title gives rise to equitable jurisdiction unless there is an adequate remedy at law.

9. Drains—91—Assessment of benefits for drainage held to create cloud on title giving equity jurisdiction.

An assessment of benefits against land affected by a drainage improvement, or fixing the proportion of benefits thereof, under Rev. Code S. D. 1919, §§ 8463, 8464, *held* to create a cloud on the title giving equity jurisdiction.

10. Action—62—Suits to enjoin drainage assessments held not premature.

Suits in federal court to enjoin drainage district assessment proceedings on the ground that they were unauthorized *held* not premature.

11. Courts—328(11)—Threatened drainage assessments held to exceed $3,000 giving federal court jurisdiction.

Where the proportion of benefits for drainage improvements had been assessed on a unit basis and it was merely a matter of computation to determine the amount assessed against each tract of land, the apportioning being subject to change only if landowner should convince the county commissioners that their conclusion was erroneous, the federal court had jurisdiction of suits attacking such threatened assessments as exceeded $3,000.

12. Courts—263, 278—Federal court did not lose jurisdiction by failing to decide constitutional question.

The jurisdiction of the federal court in a suit presenting a constitutional question extended to all questions involved in the case, and it did not lose jurisdiction by omitting to decide the constitutional ones.

13. Estoppel—74—Acts of landowners outside of original drainage district held not to estop them from attacking validity of drainage assessments.

The fact that railroads and other landowners had been in close touch with drainage ditch proceedings and had in several instances encouraged the work and had been assessed for benefits to other lands in the original drainage district without protest *held* not to estop them from attacking the validity of the assessment as to property outside the original district, where they had no notice at the time of such acts that benefits would be assessed on such property.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suits, by the Chicago, Rock Island & Pacific Railway Company, by the Chicago, Milwaukee & St. Paul Railway Company, by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, by the Northern States Power Company, by the City of Sioux Falls, and by the Great Northern Railway Company, respectively, against A. G. Risty and others, as County Commissioners, and others. From decrees for plaintiffs (282 Fed. 364) the defendants in each case appeal. Affirmed.

In the year 1907 the board of county commissioners of Minnehaha county, S. D., acting under the drainage statutes of that state, established and had constructed a drainage ditch known as drainage ditch No. 1, bottom width of 40 feet, at an expense of $46,600. This ditch was north of Sioux Falls and ran first in a southerly direction from its initial point; thence easterly past the pumping station of the city of Sioux Falls; thence southeasterly about 1,000 feet to the Big Sioux river near the north limits of Sioux Falls. It passed through a ridge and descended approximately 100 feet in the terminal thousand feet. A spillway was constructed to carry the water down the descent. This ditch was approximately three miles in length, and there was a spur 670 feet long extending northwest into a bayou about 2,000 feet south of the initial point.

In 1910 the board of county commissioners established another drainage ditch known as drainage

ditch No. 2, which extended north from the northern terminal of drainage ditch No. 1, for a distance of about 12 miles. This ditch likewise had a 40-foot bottom and was constructed at a cost of $81,-106.19. These two ditches, making in fact one continuous ditch, drained certain agricultural lands, and traversed the land north of the city of Sioux Falls near the gravel bed from which the city obtained its water supply. It also passed near the state penitentiary lands and emptied into the Big Sioux river north of the falls in said river.

In the year 1916 there was a breaking of the river through the natural barrier into the bayou drained by the lateral branch. This, coupled with the large volume of water passing through these ditches, made it impossible for the spillway to carry the same, and it was washed out and destroyed. The waters therefore being uncontrolled descended from the steep bluff to the level of the Big Sioux river, and serious damage was threatened to various interests. There was danger that the Big Sioux river which flowed through the city of Sioux Falls would be diverted from its course and flow through these ditches cutting off the water supply of the city of Sioux Falls, injuring the Northern States Power Company, and depriving it of its water power.

The board of county commissioners attempted to devise some plan to reconstruct the spillway and to protect these various interests from the threatened damages.

April 8, 1916, certain parties filed a petition with the board of county commissioners asking

that that portion of drainage ditch No. 1 containing the old spillway be closed and abandoned, and the course of said ditch extended in a southerly direction through Covell's Lake to the Big Sioux river; and said board did pass a resolution that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof.

August 3, 1916, a petition of F. L. Blackman and other parties was filed entitled, "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said Drainage Ditch Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefited Thereby." This petition was transmitted by the board to the state engineer, and on August 14, 1916, a survey was ordered.

September 13, 1916, a report of the survey was made and filed by the engineer in charge. A resolution was thereupon adopted by the board fixing the line and width of said new proposed ditch in the exact location of old ditches No. 1 and No. 2, and providing for the time and place of hearing the petition. Notice was published for three successive weeks describing the route of the proposed drainage, and the tract of country likely to be affected thereby, in the general terms provided by the statute; also, the separate tracts of land through which the proposed ditch would pass, and the names of the owners of said tracts. Such notice informed all persons affected by the proposed drainage to appear at such hearing and show cause

why the same should not be established. Upon the return date of the notice the commissioners adopted a resolution purporting to establish the so-called drainage ditch No. 1 and 2, and providing for the reconstruction of the spillway.

No appeal was taken from this order establishing the purported new project.

The commissioners then caused ditches No. 1 and No. 2 to be cleaned out, widened, deepened, and diked so as to increase the carrying capacity; caused the spillway to be reconstructed, and certain portions of the Big Sioux river to be straightened. This work cost approximately $255,000, and drainage warrants were issued to be paid out of taxes assessed against the property determined to be benefited within the area of the purported new drainage ditch No. 1 and 2. The largest holders of these warrants are interveners in this action.

In April, 1919, notice was published of a hearing upon the matter of equalizing benefits resulting from said drainage ditch No. 1 and 2, and this was the first intimation that certain of appellees had that benefits might be assessed against them. The property of some of the appellees was not covered by the notice. However, the proceedings under this notice were abandoned.

June 10, 1921, appellant board by resolution fixed a proportion of benefits in units, which had been decided upon as a fair method of arriving at the same, on drainage ditch No. 1 and 2, and designated Monday August 1, 1921, at the office of the county auditor, as the time and place for a

hearing on the question of equalizing benefits, and caused notice of such hearing to be published as provided by the statute. Under the unit system adopted by the board upon recommendation of their engineer, the various appellees had units allotted against them as follows:

Chicago, Rock Island & Pacific Railway Company, out of a total of 32,549.62 units, 839.45.

Chicago, Milwaukee & St. Paul Railway Company, 1,681.

Chicago, St. Paul, Minneapolis & Omaha Railway Company, 839.45.

Northern States Power Company, 5,351.63.

Great Northern Railway, 613.85.

City of Sioux Falls, 3,147.95.

The amount due on warrants issued for this work at the time the actions were brought was about $300,000. The total units of benefit aggregate 32,549.62, so each unit of benefit amounts to slightly in excess of $9. If no changes had been made by the board, had they been permitted to proceed; the amounts charged against various appellees would have ranged from $50,000 against the Northern States Power Company to substantially $6,000 against the Great Northern Railway Company.

Appellees brought suit to restrain appellants from proceeding further with the equalization of said purported benefits and from levying any assessment upon their property to pay therefor. Some of the appellees had no property in original ditch district No. 1 and No. 2; others of appellees

did have, and some difference is made in the contention of those not having property in the original ditch district and those who did have, but the issues in the main were the same as to all the parties.

All of the appellees contended in the trial court that the South Dakota drainage law was unconstitutional, violating the Fourteenth Amendment to the Constitution of the United States; that it also violated sections 2 and 3 of article 6 of the Constitution of the State of South Dakota. Some of the appellees contended that the board exceeded its powers in what it attempted to do, in that the same was not for the drainage of agricultural lands, but being for other public purposes, could only be carried on by the corporate authority of drainage district entities established for that purpose, which had not been done, and that consequently the proceedings were void.

Others of the appellees contended that the proceeding seeking to establish drainage ditch No. 1 and 2 was a subterfuge to impose liability on new territory to pay for the maintenance of the former ditches, and that the proceedings were for maintenance and repair of the old drainage ditch and were not carried on as provided by section 8470 of the Code of South Dakota relating to assessments for the maintenance of drainage already established; that drainage ditch No. 1 and 2 was not a new ditch and not a new enterprise.

Further claim is made by the railroad appellees that the South Dakota drainage law is unconstitutional so far as respects assessments of railroad

property, in that it provides for the giving of no notice whatever of the apportionment and equalization of benefits to railroad companies.

All appellees claim that the attempted assessments upon their property are arbitrary, unjust and illegal, and constitute a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law; and that the proceedings create a cloud upon their title.

It was the position of appellants, on the other hand, that the statutes referred to were constitutional; that the federal court in equity had no jurisdiction because there was a complete remedy at law; that there was no equitable question involved; no irreparable injury shown; no facts sufficiently pleaded to show any threatened cloud upon title; that the amount involved was not sufficient to give jurisdiction; that the bringing of the suit was premature; that ditch No. 1 and 2 was legally established as a new drainage project under the statutes of South Dakota; and that the board of county commissioners had full jurisdiction to do each and every act which they performed.

The trial court held that section 8461 of the Revised Statutes of South Dakota, being the statute particularly attacked as unconstitutional, gave sufficient notice and opportunity to be heard before an assessment became a lien against the property, and was constitutional. The court also held that the proceedings of the commissioners were proceedings for the maintenance of the original ditches No. 1 and No. 2; that there was no abandonment of the old ditches; that the formation of the new

ditch was a pretense and subterfuge carried on for the purpose of compelling property outside of the original ditches No. 1 and No. 2 to share the burden of the repair and maintenance of these ditches, and held that the proceedings of the commissioners with relation to ditches No. 1 and No. 2, by attempting to constitute a new drainage district and calling it district No. 1 and 2, were void.

The court further found that the complaints presented a real and substantial question under the Constitution of the United States; that the amount involved was in excess of $3,000 exclusive of interest and costs, and that each complainant stated a case in his bill cognizable in equity in the federal court; and that there was no adequate remedy at law. Also found that diversity of citizenship existed as to all appellees, except as to the city of Sioux Falls; also, that the method of attempted assessment was discriminatory and arbitrary. The injunctions as prayed were granted.

N. B. Bartlett and E. O. Jones, both of Sioux Falls, S. D., for appellants.

A. B. Fairbank, of Sioux Falls, S. D. (Edward S. Stringer, Thomas D. O'Brien, and Alexander E. Horn, all of St. Paul, Minn., on the brief), for appellee Chicago, R. I. & P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D., and E. L. Grantham, of Aberdeen, S. D. (H. H. Field, of Chicago, Ill., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, M. & St. P. Ry. Co.

C. O. Bailey, of Sioux Falls, S. D. (R. L. Kennedy, of St. Paul, Minn., and J. H. Voorhees, P. G. Honegger, T. M. Bailey, and C. O. Bailey, Jr., all of Sioux Falls, S. D., on the brief), for appellee Chicago, St. P., M. & O. Ry. Co.

Harold E. Judge, of Sioux Falls, S. D. (R. M. Campbell, of Chicago, Ill., on the brief), for appellee Northern States Power Co.

C. O. Bailey, of Sioux Falls, S. D. (Roy B. Marker, of Sioux Falls, S. D., on the brief), for appellee City of Sioux Falls.

Harold E. Judge, of Sioux Falls, S. D., for appellee Great Northern Ry. Co.

Before KENYON, Circuit Judge, and TRIEBER and DYER, District Judges.

KENYON, Circuit Judge (after stating the facts as above). [1] It is earnestly contended by appellees that the entire South Dakota drainage law is unconstitutional, not only as violative of the due process clause of the Fourteenth Amendment of the Federal Constitution, but also sections 2 and 13 of article 6 of the South Dakota Constitution. The constitutional questions raised are grave, serious, and doubtful. Their determination is not necessary to the solution of these cases. Therefore, under the well-established rule that federal courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside. Howat et al. v. State of Kansas, 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550; Weyman-Bruton Co. v. Ladd, 231 Fed. 898, 146 C. C. A. 94; Allen, U. S. Atty., v. Omaha Live Stock Commission Co. et al. (C. C. A.) 275 Fed. 1.

[2] The original drainage ditches No. 1 and No. 2 were properly established for the drainage of agricultural lands. When the spillway washed out, the maintenance of the ditches was impaired. Not only that, but the situation was fraught with grave consequence to many interests. The steep bluff was being torn away by the uncontrolled waters; the waterworks and water supply of the city of Sioux Falls, as well as the penitentiary lands of the state, were endangered. A not improbable result of the Big Sioux river breaking through the natural barrier into the lateral ditch would be the enttire diversion of its waters from their natural channel causing them to flow through said ditches and empty into the river north of the city, leaving Sioux Falls with an intermittent dry river bed.

The board of county commissioners under these conditions took steps to remedy the situation, and upon petition filed stating its object in its caption as follows: "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon Property, Persons and Corporations Benefited Thereby," proceeded to establish what is termed drainage ditch No. 1 and 2, Minnehaha county, S. D.

Appellees who have property within the area of the original drainage ditches, No. 1 and No. 2, insist that the proceedings established a new drain-

age ditch known as No. 1 and 2, which is also the position taken by appellants. Other appellees claim that the work was in truth and in fact a project for the repair of drainage ditches No. 1 and No. 2. The court held that the forming of the new ditch was a pretense and subterfuge resorted to for the purpose of attempting to burden appellees with the cost of maintenance of ditches theretofore constructed; that the commisisoners did not act as by law provided for the maintenance and repair of the ditches; and that the proceedings attempting to establish the new drainage ditch were void. We think the court was correct in this holding. It clearly expressed the situation as follows:

"Under these circumstances the board of county commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the state when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage ditch No. 1 and 2 was ever established and has no existence.

"I am of opinion that the proceedings of the board of commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it district No. 1 and 2, and to assess benefits to the property of the plaintiffs, in so far as they are located in the city of Sioux Falls, are void. Entertaining this view, it follows that plaintiffs' prayer for an injunction should be granted."

Record, p. 90, Case No. 6313.

The proceedings, regardless of how designated, were in fact for repaiar and maintenance, and were governed as to assessments to pay for the same by section 8470 of the South Dakota Statutes, which section is as follows:

"*Assessments for Maintenance.*—For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportions determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be made as other assessments for the construction of drainage, certificates may be issued thereon and such assessments and certificates shall be liens, interest-bearing, perpetual and enforceable, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance, or may be collected directly by the board of county commissioners." Section 13, c. 98, 1905; section 13, c. 134, 1907.

There is no provision in this statute for the taking in of other lands to help bear the assessment of burdens created in maintaining the original drainage. This was the statute under which the board of county commissioners could have provided for payment of maintenance and repairs to the established ditches.

Section 8489 provides for a method of abandonment of drains under certain circumstances and the construction of new ones in the same location. Said statute is as follows:

"*Invalid or Abandoned Proceedings.*—If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned proceeding, the board of county commissioners shall proceed to ascertain the real value of the services rendered, money expended and work done under such invalid, abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may be at the same time or at

any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested to show cause why the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by any board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons." Section 33, c. 134, 1907.

The proceedings establishing drainage ditches No. 1 and 2 have never been set aside or abandoned under this statute. It is true a small portion of old ditch No. 1 was abandoned by the resolution adopted in the Covell's Lake proceeding, but the ditches were in no way abandoned. The Covell's Lake proceeding was itself abandoned and the ditches were left as they originally were, so it is apparent that the action of the board was not taken under section 8489. Either the proceedings were to repair and maintain ditches already constructed, or they were to take care of a situation resulting from their imperfect or inadequate construc-

tion. By reason of the water of the river breaking through into the lateral threatening a change of the river's course and the possible destruction of state lands, a situation was presented, not with relation to the drainage of agricultural lands, but rather to the failure of the ditches, due to inadequate or imperfect construction, to carry the increased flow of water. In other words, the project, if an entirely new one, was not for the drainage of agricultural lands. The court said in his opinion:

"Pursuant to this provision of the Constitution, the Legislature of the state has provided for the drainage of agricultural lands; but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands 'for any public use.'"

[3] We are satisfied that under the South Dakota Constitution, section 6, art. 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes.

[4, 5] Appellants challenge the jurisdiction of the court, claiming there was a plain, adequate, and complete remedy at law; that there was no equity in the bill; that action was premature, and that the necessary jurisdictional amount was not involved. These in their order.

It is fundamental that equity cannot give relief where there is a plain, adequate, and complete remedy at law. It is provided by the federal Judicial Code, Compiled Stat. 1918, § 1244, as follows:

"*Suits in Equity.*—Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (R. S. § 723. March 3, 1911, c. 231, § 267, 36 Stat. 1163.)"

It must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. et al. v. Means, 151 Fed. 159, 80 C. C. A. 527; McMullen Lumber Co. v. Strother et al., 136 Fed. 295, 69 C. C. A. 433; Morgan v. Beloit, City and Town, 74 U. S. (7 Wall.) 613, 19 L. Ed. 203; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Greene, Auditor, et al., etc., v. Louisville & Interurban Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Coler et al. v. Board of Com'rs of Stanly County et al. (C. C.) 89 Fed. 257.

It must be a remedy on the law side of the federal court. A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy. Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Smyth v. Ames, 169 U. S. 466, 516 18 Sup. Ct. 418, 42 L. Ed. 819; United States Life Ins. Co. in

City of New York v. Cable, 98 Fed. 761, 39 C. C. A. 264; Brun et al. v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

[6] The question is: Has party the adequate remedy at law in the federal court?

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 391, 14 Sup. Ct. 1047, 1052 (38 L. Ed. 1014), the court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

It has been held that where the state statute provided an action at law against the county for the recovery of sums paid on account of invalid taxes that the same constitutes a plain, speedy, and adequate remedy at law. Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., 217 Fed. 540, 133 C. C. A. 392. The Supreme Court of the United States has held that the North Dakota statute permitting actions respecting title of the property or accruing on contract to be brought

against the state the same as against a private person does not clearly allow an adequate remedy; and there, injunction restraining defendants from taking steps to enjoin certain taxes, was upheld. Wallace et al. v. Hines, Director General of Railroads, et al., 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782. There was no such proceeding as discussed in Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., supra, in the South Dakota statutes. The only remedy was to appear before the board of county commissioners (claimed by appellees to be acting without authority), and then appeal from their finding to the state court. Such was not the adequate remedy contemplated by the federal statute.

[7] While the frequent exercise of equity jurisdiction is in staying the collection of taxes illegal in whole or in part, a suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal. There must be special circumstances bringing the case under some recognized head of equity jurisdiction. The right to such equitable relief must be clear where it is asked to restrain the collection of a state tax.

In Hannewinkle v. Georgetown, 15 Wall. 547, 548 (21 L. Ed. 231), it is said:

"It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is appre-

hension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."

In Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 525, 526, 5 Sup. Ct. 601, 605 (28 L. Ed. 1098), the rule is clearly laid down by the court:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any grounds for equitable interposition. In ordinary cases a

party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many state courts."

See, also, Dows v. City of Chicago, 78 U. S. (11 Wall.) 108, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Pittsburgh, etc., Railway v. Board of Public Works of W. Va., 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the alleged invalidity consisted in discriminatory overvaluation. There was no claim of absolute illegality in the assessment. Appellant had a remedy with the board of review to correct the assessment, and the court said that resort to the suit to prevent either a sale for an illegal tax creating a cloud upon title or other irreparable injury had no basis.

In Union Pacific R. Co. v. Board of Com'rs of Weld County, 217 Fed. 540, 133 C. C. A. 392, this

court said with reference to the casting of a cloud upon real property creating an "equitable circumstance" that the remedy which the statute prescribes will dissipate any such cloud, and says:

"Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted."

There is no such provision in the South Dakota statute.

In Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, it was held that equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected in suit at law in which the defense of its illegality is open, and further it not appearing that the tax is a lien on any of complainant's property.

In Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651, certain assessments upon shares of stock in a corporation were involved. The court found that as there was no lien created on real estate there was no cloud on title.

[8, 9] It is well settled that an assessment that will put a cloud on title gives rise to equitable jurisdiction unless there is an adequate remedy at law. Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; Greene, Auditor, et al., etc., v. Louisville & Interurban

Railroad Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

Section 8463 of the South Dakota Statutes provides for the board of county commissioners fixing the proportion of benefits of proposed drainage among the lands affected.

Section 8464 provides for the board making an assessment against each tract and property affected, and this is collectible by the treasurer's office. Clearly the assessment would create a cloud upon the title. Fixing the proportion of benefits being preliminary to the assessment and a part of the machinery of assessment, likewise, we think, creates a cloud upon the title and gives equity jurisdiction. Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Hopkins et al. v. Walker et al., 244 U. S. 486, 37 Sup. Ct. 711, 61 L. Ed. 1270.

[10] Was the case prematurely brought? It is claimed that inasmuch as the board of county commissioners had not assessed the taxes complained of consequently the suit is premature.

In Western Union Telegraph Co. v. Howe et al., 180 Fed. 44, 103 C. C. A. 398, it was held by this court that the suit was prematurely brought because the telegraph company did not pursue the remedy afforded by law to have its assessment corrected by the state board of equalization. That was not a case, however, where it was claimed that the entire proceedings were without authority and illegal, as is the case here. The jurisdiction to act was not questioned.

In Keokuk & Hamilton Bridge Co. v. Salm et al., 258 U. S. 122, 42 Sup. Ct. 207, 66 L. Ed. 496, the question involved was the amount of the tax. It was not claimed that the proceedings were illegal.

In the late case of Milheim et al. v. Moffat Tunnel Improvement District et al., 262 U. S. 710, 43 Sup. Ct. 694, 67 L. Ed. 1194, there was no question of jurisdiction of the taxing body as there is here. Plaintiff's property was by legislative act placed within the taxing district.

The proceeding here involved, being without authority, the situation is quite different from where the only question involved is the inequality of taxes levied by a board having jurisdiction to act. The actions, we are satisfied, were not premature.

[11] Appellants urgently insist that it does not appear from the record that the amount in controversy, exclusive of interest or costs, exceeds the sum or value of $3,000, and that the statements in the various complaints of appellees so alleging are false, and stated with the fraudulent purpose of imposing upon the jurisdiction of the federal court; that no tax has in fact been assessed; that the apportionment of benefits is tentative and subject to correction; and that there is no way of determining what the amount of the assessment against the respective appellees would have been had the proceedings not been interrupted by the injunctions; and that there is in fact no sum whatsoever in controversy between the parties hereto.

It has been held that future, undetermined, unaccrued, or unspecified taxes cannot be taken into

consideration to give jurisdiction; that the court cannot engage in speculation as to such taxes. Holt v. Indiana Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374; New England Mortgage Security Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951. Also, that where there is a suit to enjoin collection of a tax the amount of the tax is the test of jurisdiction. Linehan Ry. Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585; Eachus v. Hartwell et al. (C. C.) 112 Fed. 564; Washington & Georgetown R. R. Co. v. District of Columbia, 146 U. S. 227, 13 Sup. Ct. 64, 36 L. Ed. 951; Board of Trustees of Whitman College v. Berryman et al. (C. C.) 156 Fed. 112; Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451; City of Ottumwa, Iowa, v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence, that the jurisdiction will be sustained. Maffet v. Quine (C. C.) 95 Fed. 199; Von Schroeder v. Brittan (C. C.) 93 Fed. 9.

What is the situation here? Each one of the appellees is threatened with an assessment of more than $3,000. The Northern States Power Company is threatened with one of $50,000. And fur-

ther, certain appellees who have no property within the original drainage districts No. 1 and No. 2 are brought into the district and made liable to future assessments for maintenance and repair of ditches. It appears from the record that the board of county commissioners had fixed against the different appellees the proportion of benefits on a unit basis. It is without question that the county commissioners have issued approximately $255,000 worth of warrants for this work, and that the amount due thereon is about $300,000. It is a matter then of mere mathematical calculation to arrive at the threatened assessment against each one of appellees.

Exhibit C is the notice to the various parties against whom proportions of benefits have been fixed. It provides as follows, to wit:

"All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said board made final."

If no action whatever were taken by appellees the amounts would be final, and under these circumstances we believe the amount in dispute in each case exceeds the jurisdictional requirement. The claim of amount is evidently made in good faith, and not for the mere purpeos of giving the federal courts jurisdiction. We do not believe that where the board has passed a resolution fixing benefits which exceed the jurisdictional amount and are the basis of a proposed assessment, and which

parties claim are fixed by the board without authority, that because said board may equalize the benefits or even find that no benefits exists the parties must wait until the final action of the board. It is suggested that the board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter stood when the case was brought each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.

As the proportion of benefits had been fixed subject to change by the board only if appellees should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court.

[12] All bills of complaint raise questions under the federal Constitution that are substantial and not merely colorable. Hence the court has jurisdiction exclusive of diversity of citizenship, which existed as to all appellees except the city of Sioux Falls, necessary amount being involved, to determine all questions in the record, and it has not lost jurisdiction by omitting to decide the constitutional ones. Siler et al., etc., v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; Louis. & Nash. R. R

Co. v. Finn, 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. 379; Greene, Auditor, et al., etc., v. Louis. & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

[13] Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original drainage ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the board of commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials. As to the city of Sioux Falls, it is claimed by way of estoppel that under due authority the mayor and city auditor signed the petition for the project. There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original drainage ditches No. 1 and No. 2. As to the other appellees, the decree related only to the property outside of the original assessment areas of drainage ditches No. 1 and No. 2. So we are to consider the situation as bearing on the

question of estoppel only as to the property outside of the original assessment areas up to the time of the notice of the fixing of benefits. The various appellees as to such property had no notice, when the acts constituting the alleged estoppel took place, that the same was to be affected by the drainage construction or would be assessed for the cost thereof. Hence the claimed acts of agents and officers of appellees would not constitute estoppel. The situation is quite different from that presented in Gilseth v. Risty (S. D.) 193 N. W. 132—at least as to all appellees except the city of Sioux Falls. We do not pass on the question of estoppel as to any appellees, as to assessments that may be made on their property within the original area of ditch No. 1 and ditch No. 2, for the purpose of maintaining such ditches.

Other questions are presented which we think are not involved in the determination of these cases.

The decree of the trial court in each case is affirmed.